



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

### Usage guidelines

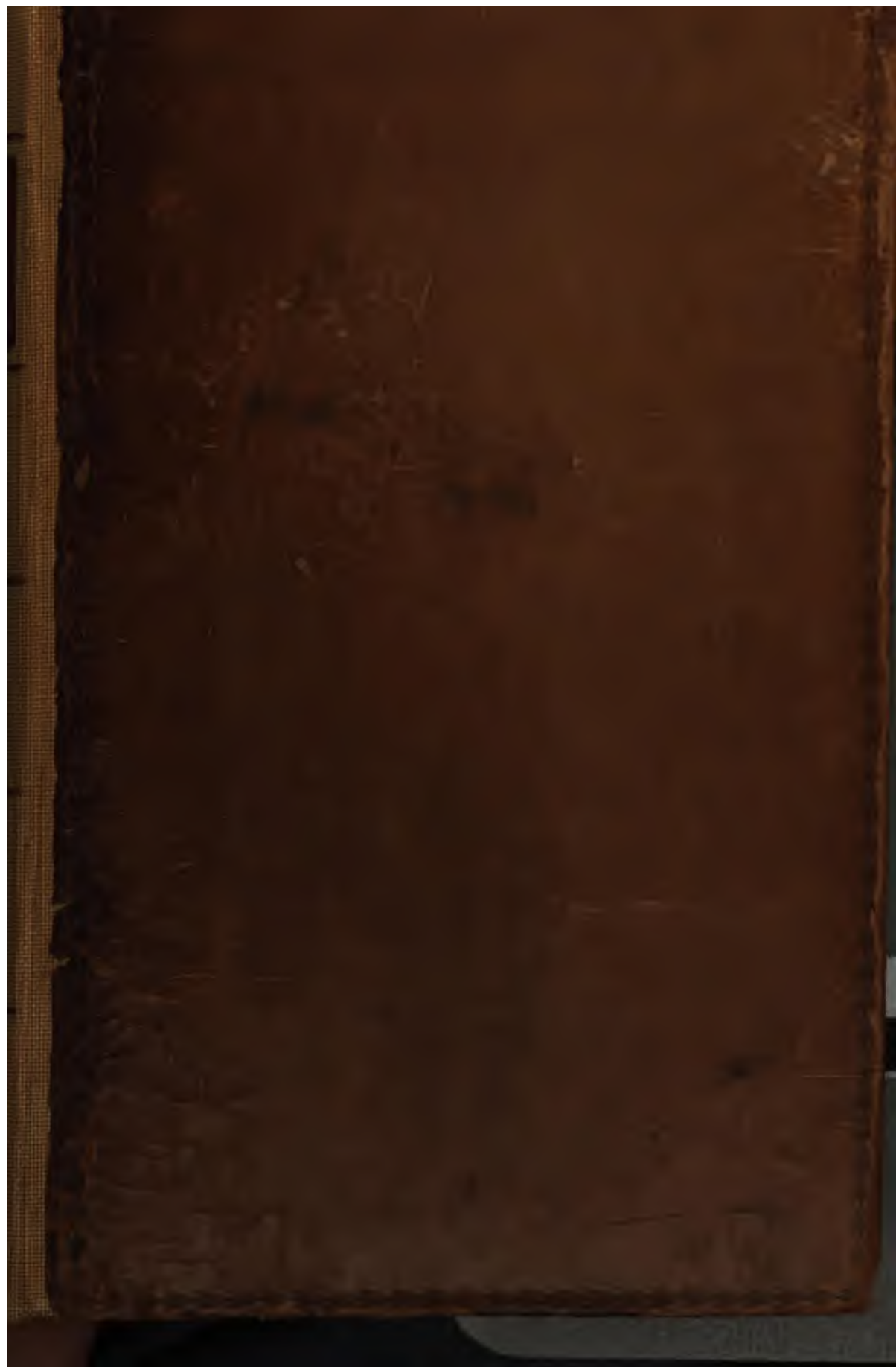
Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

### About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>



*for*

*A. 21. 185.*

*Mr.*

**L.L. CW.U.K:**

**100**

**180**



*R. Lare.*





R E P O R T S

OF

C A S E S

ARGUED AND DETERMINED

IN THE

**Courts of Common Pleas**

AND

**Exchequer Chamber,**

WITH

**TABLES OF THE NAMES OF THE CASES AND THE PRINCIPAL  
MATTERS.**

---

**BY JOHN BAYLY MOORE,**

OF THE INNER-TEMPLE, ESQUIRE.

---



**VOL. I.**

**CONTAINING THE CASES FROM HILARY TERM 57 GEO. III. TO MICHAELMAS  
TERM 58 GEO. III. 1817, BOTH INCLUSIVE.**

---

**LONDON :**

**PRINTED FOR CHARLES HUNTER, LAW BOOKSELLER,  
26, BELL-YARD, LINCOLN'S-INN.**

**1818.**

**T. DAVISON, LOMBARD-STREET, WHITEFRIARS, LONDON.**

**J U D G E S**  
**OF THE**  
**COURT OF COMMON PLEAS,**  
**DURING THE PERIOD OF THESE REPORTS.**

**The Right Hon. Sir VICARY GIBBS, Knt., Lord Chief Justice.**

**The Hon. Sir ROBERT DALLAS, Knt.**

**The Hon. Sir JAMES ALLAN PARK, Knt.**

**The Hon. Sir JAMES BURROUGH, Knt.**



A

# TABLE

OF THE

## CASES REPORTED

IN THE FIRST VOLUME.

The Cases which are printed in *Italics* were cited from *MS. Notes*.

A.			
		<i>Page</i>	<i>Page</i>
ABBOTT <i>v.</i> Abbott	.	160	Bell <i>v.</i> Jutting . . . 155
Abbott, Abbott <i>v.</i>	.	160	Bennet <i>v.</i> Moita . . . 4
Abbott, Wallbank <i>v.</i>	.	573	Benson <i>v.</i> Schneider . . 21, 76
Alderson, Raw <i>v.</i>	.	145	Beverley, Gammon <i>v.</i> . . 563
Anonymous . . . .	.	126	Bickford, Sellers <i>v.</i> . . 460
Armstrong <i>v.</i> Stratton	.	110	Birch, Hindle <i>v.</i> . . . 455
Aspinall, Webb <i>v.</i>	.	428	Bird <i>v.</i> Dale . . . . . 290
Atkins, Kemble <i>v.</i>	.	6	Blanck <i>v.</i> Solly . . . . 531
Attorney-General <i>v.</i> Corporation of Rye	.	267	Blenkinsop <i>v.</i> Clayton . . 328
Austen <i>v.</i> Howard . .	.	68	Blogg, Holmes <i>v.</i> . . . 466
			Boghurst, Prebble <i>v.</i> . . 258
			Boone, vouchee; Lancaster, demandant; Wilmot, tenant . . . . . 95
B.			
Baker <i>v.</i> Townshend . .	.	120	Bowley, Silversides <i>v.</i> . . 92
Barandon, Truettel <i>v.</i>	.	543	Boyd, Tulloch <i>v.</i> . . . 174
Bartholomew, vouchee; Wil-	.		Bradley, Emmett <i>v.</i> . . . 332
lis, demandant; Calvert,	.		Bray, Gibson <i>v.</i> . . . . 519
tenant . . . . .	.	131	Bridges, King <i>v.</i> . . . . 43
Bell, Everth <i>v.</i> . . . .	.	158	Brown <i>v.</i> Millner . . . . 65
			Brown, Thomson <i>v.</i> . . . 358

# TABLE OF THE CASES REPORTED.

	<i>Page</i>		<i>Page</i>
Burt, Nixon <i>v.</i>	413	Donne <i>v.</i> Marsh	320
Burt, Reed <i>v.</i>	413	Dorrien, Lucas <i>v.</i>	29
Button <i>v.</i> Corder	109	Down <i>v.</i> Down	80
Bye, plaintiff; Haywood, de- forciant	125	Down, Down <i>v.</i>	80
Byland <i>v.</i> King	24	Duncan <i>v.</i> Richmond	99
		Dunn <i>v.</i> Slee	2
		Durstan <i>v.</i> Tuthan	554
C.		E.	
Calvert, tenant; Willis, de- mandant; Bartholomew, vouchee	131	Elliott, Mitford <i>v.</i>	434
Chandler, Hindmarsh <i>v.</i>	250	Ellis, Reid <i>v.</i>	29
Christie, Fairlie <i>v.</i>	114	Emmett <i>v.</i> Bradley	332
Clay, Johnston <i>v.</i>	200	Everth <i>v.</i> Bell	158
Clayton, Blenkinsop <i>v.</i>	328	Eyles, deforciant; Moule, plaintiff	125
Clayton, Bart. Deane <i>v.</i>	203		
Cooke <i>v.</i> Tanswell	465	F.	
Comber, Gall <i>v.</i>	279	Fairlie <i>v.</i> Christie	114
Corder, Button <i>v.</i>	109	Farley, Farquhar <i>v.</i>	322
Cornfoot, Reid <i>v.</i>	29	Farquhar <i>v.</i> Farley	322
Corporation of Rye, Attorney- General <i>v.</i>	267	Ferry <i>v.</i> Williams	498
Craddock, Lock <i>v.</i>	144	Flint, Key <i>v.</i>	451
Craven <i>v.</i> Craven	403	Fossett, Kerval <i>v.</i>	147
Craven, Craven <i>v.</i>	403	Fraser, Partridge <i>v.</i>	54
Crispin <i>v.</i> Williamson	547	Free <i>v.</i> Hawkins	28. 535
Curwen, Rex <i>v.</i>	494	Fry, Stewart <i>v.</i>	74
D.		G.	
Dale, Bird <i>v.</i>	290	Gall <i>v.</i> Comber	279
Davies <i>v.</i> Lord Rendlesham	410	Gammon <i>v.</i> Beverley	563
Davis, Harmer <i>v.</i>	300	Garland <i>v.</i> Noble	187
Day, Wood <i>v.</i>	389	Garrod, Redford <i>v.</i>	253
Deane <i>v.</i> Clayton ( <i>Bart.</i> )	203	Gibson <i>v.</i> Bray	519
Dell, Doe <i>d. v.</i> Pigott	274	Gill <i>v.</i> Hinckley	79
Dickinson, Matthews <i>v.</i>	104	Goodford, Harvey <i>v.</i>	464
Doe <i>d. Dell v.</i> Pigott	274	Goodmin, Millington <i>v.</i>	186
Doe <i>d.</i> Governors of St. Mar- garet's Hospital <i>v.</i> Roe	113	Governors of St. Margaret's Hospital, Doe <i>d. v.</i> Roe	113
Doe <i>d.</i> Webb <i>v.</i> Goundry	118		

# TABLE OF THE CASES RECORDED.

	<i>Page</i>		<i>Page</i>
Goundry, Doe <i>d.</i> Webb <i>v.</i>	118	James, vouchee; James, de-	
Graham, Powell <i>v.</i>	305	mandant; Williams, tenant	130
Greening, Harding <i>v.</i>	477	Jezeph <i>v.</i> Ingram	189
		Johnson <i>v.</i> Northwood	480
H.		Johnston <i>v.</i> Clay	200
Hardey, Hickling <i>v.</i>	61	Jones <i>v.</i> Hill	100
Harding <i>v.</i> Greening	477	Jutting, Bell <i>v.</i>	155
Harmer <i>v.</i> Davis	300	Jutting, Wheelwright <i>v.</i>	51
Hart, Wilson <i>v.</i>	45		
Hartley <i>v.</i> Hodson	430, 514	K.	
Hartop, Toussaint <i>v.</i>	287	Kemble <i>v.</i> Atkins	6
Harvey <i>v.</i> Goodford	464	Kervall <i>v.</i> Fossett	147
Hawkins, Free <i>v.</i>	28, 535	Key <i>v.</i> Flint	451
Haywood, deforciant; Bye,		King <i>v.</i> Bridges	43
plaintiff	125	King, Byland <i>v.</i>	24
Hellings <i>v.</i> Shaw	340		
Hemming <i>v.</i> Plenty	529	L.	
Herbert, Levy <i>v.</i>	56	Laing, Walker <i>v.</i>	281
Herbert, Partridge <i>v.</i>	54	Lancaster, demandant; Wil-	
Hickling <i>v.</i> Hardey	61	mot, tenant; Boone, vou-	
Hill, Jones <i>v.</i>	100	chee	95
Hinckley, Gill <i>v.</i>	79	Langhorn, Lingham <i>v.</i>	251
Hindle <i>v.</i> Birch	455	Ledwich <i>v.</i> Prangnell	299
Hindmarsh <i>v.</i> Chandler	250	Lee <i>v.</i> Munn	481
Hitchcock, Spink <i>v.</i>	131	Lee <i>v.</i> Zagury	556
Hodson, Hartley <i>v.</i>	430, 514	Levy <i>v.</i> Herbert	56
Holmes <i>v.</i> Blogg	466	Lingham <i>v.</i> Langhorn	251
Hooman, Taylor <i>v.</i>	161	Lock <i>v.</i> Cradock	144
Hooper, Prosser <i>v.</i>	106	Lucas <i>v.</i> Dorrien	29
Hopper <i>v.</i> Reeve	407		
Horsfall <i>v.</i> Testar	89	M.	
Howard, Austen <i>v.</i>	68	Macdougall, Inglis <i>v.</i>	196
Hurry, Morris <i>v.</i>	54	Macnair, Stone <i>v.</i>	126
		Margaret's Hospital, (Go-	
I. & J.		vernors of), Doe <i>d.</i> <i>v.</i> Roe	113
Inglis <i>v.</i> Macdougall	196	Marsh, Donne <i>v.</i>	320
Ingram, Jezeph <i>v.</i>	189	Marshall, Williams <i>v.</i>	168
James, demandant; Williams,		Matthews <i>v.</i> Dickinson	104
tenant; James, vouchee	130	Memoranda	1, 98



# TABLE OF THE CASES REPORTED.

	<i>Page</i>		<i>Page</i>
Mill v. Pollon . . . .	19	Reed v. Burt . . . .	413
Millington v. Goodmin . .	186	Reeve, Hopper v. . . .	407
Millner, Brown v. . . .	65	Regula Generalis . . . .	256
Mitford v. Elliott . . . .	434	Reid v. Cornfoot . . . .	29
Moita, Bennet v. . . .	4	Reid v. Ellis . . . .	29
Moore v. (Earl of) Plymouth	346	Rendlesham ( <i>Lord</i> ) Davies v.	410
Morris v. Hurry . . . .	54	Rex v. Curwen . . . .	494
Moule, plaintiff; Eyles, de-		Richmond, Duncan v. . . .	99
forçant . . . .	125	Robinson v. Yarrow . . . .	150
Munn, Lee v. . . .	481	Roe, Doe d. Governors of St.	
		Margaret's Hospital v. . . .	113
N		Rowe v. Pickford . . . .	526
Nixon v. Burt . . . .	413	Rye (Corporation of) Attor-	
Noble, Garland v. . . .	187	ney-General v. . . .	267
Northcote, Peele v. . . .	178		
Northwood, Johnson v. . .	420	S.	
		Samuda, Zwinger v. . . .	12
P.		Schneider, Benson v. . . .	21, 76
Partridge v. Fraser . . . .	54	Schroder v. Thompson . . . .	163
Partridge v. Herbert . . . .	54	Sellers v. Bickford . . . .	460
Patteson, Willison v. . . .	133	Shaw, Hellings v. . . .	340
<i>Pearce, in re.</i> . . . .	497	Silversides v. Bowley . . . .	92
Peele v. Northcote . . . .	178	Slee, Dunn v. . . .	2
Pickford, Rowe v. . . .	526	Soares v. Thornton . . . .	373
Figott, Doe d. Dell v. . . .	274	Solly, Blanck v. . . .	531
Plenty, Hemming v. . . .	529	Somerville, Wogan v. . . .	102
Plymouth ( <i>Earl of</i> ), Moore v.	346	Spink v. Hitchcock . . . .	131
Pollon, Mill v. . . .	19	Stephenson, deforçant; Stubbs,	
Pope v. Tilman . . . .	386	plaintiff . . . .	530
Powell v. Graham . . . .	395	Stewart v. Fry . . . .	74
Prangnell, Ledwich v. . . .	299	Stone v. Macnair . . . .	126
Prebble v. Boghurst . . . .	258	Stratton, Armstrong v. . . .	110
Promotions, &c. . . .	1, 98	Stubbs, plaintiff; Stephenson,	
Prosser v. Hooper . . . .	106	deforçant . . . .	530
		T.	
R.		Tanswell, Cooke v. . . .	465
Raw v. Alderson . . . .	145	Taylor v. Hooman . . . .	161
Redford v. Garrod . . . .	253	Testar, Horsfall v. . . .	89

## TABLE OF THE CASES REPORTED.

	Page		Page
Thackrey v. Turner . . .	457	Williams, tenant ; James, de-	
Thompson, Schroder v. . .	163	mandant; James, vouchee	130
Thomson v. Brown . . .	358	Williamson, Crispin v. . .	547
Thornton, Soares v. . .	373	Willis, demandant ; Calvert,	
Tilman, Pope v. . .	386	tenant ; Bartholomew, vou-	
Toussaint v. Hartop . . .	287	chee . . .	131
Townshend, Baker v. . .	120	Willison v. Patteson . . .	133
Truettel v. Barandon . . .	543	Wilmot, tenant ; Lancaster,	
Tulloch v. Boyd . . .	174	demandant ; Boone, vou-	
Turner, Thackrey v. . .	457	chee . . .	95
Tuthan, Durstan v. . .	554	Wilson v. Hart . . .	45
		Wogan v. Somerville . . .	102
		Wood v. Day . . .	389
		Y.	
		Yarrow, Robinson v. . .	150
		Z.	
		Zagury, Lee v. . .	556
		Zwinger v. Samuda . . .	12



## ERRATA.

---

- Page*
- 11. last line but six, for *Atkins*, read *Litt & Co.*
  - 119. last line but seven, insert a *before* recognizance.
  - 130. in the marginal note, line 1, read *præcipe*, for *caption*.  
 — last line but three, for *caption*, read *præcipe*.
  - 145. last line but four, insert 256, after *Post*.
  - 256. line 1, for *thenceforth*, read *henceforth*.  
 — line 12, for *settled*, read *attested*.  
 — line 14, after *order*, insert *and*.
  - 265. line 25, for *had been*, read *it were*.
  - 280. last line, for *although*, read *suppose*.
  - 281. line 4, for *commission*, read *guarantie*.  
 — in the marginal note, last line but four, for *creditors*, read *debtors*.
  - 289. line 21, for *submitted*, read *suggested*.
  - 368. last line but four, after *demurrage*, insert ' *under the charter-party*.'  
 — last line, for *disputed*, read *varied*.
  - 369. line 20, for *entangle*, read *try*.
  - 370. line 13, for *controvert*, read *contradict*.
  - 371. last line but four, *dele* *written*.  
 — last line but three, after *agreement*, read *by deed*.
  - 372. last line but three, for *decisions*, read *dicta*.
  - 383. line 20, after *captain*, read *though*.  
 — line 21, after *goods*, read ' *he cannot recover as for barratry against  
 the underwriters.*'
  - 419. line 2, *dele* *that*.



# CASES

ARGUED AND DETERMINED

IN THE

**Court of Common Pleas,**

IN

**HILARY TERM,**

IN THE

**FIFTY-SEVENTH YEAR OF THE REIGN OF GEORGE III.**

---

## *Memoranda.*

IN this term, *William Firth*, of *Lincoln's-Inn*, Esquire, was called to the degree of serjeant at law, and gave rings with the motto, '*Ung Roy, ung Loy, ung Foy.*'

---

Lord Chief Justice GIBBS was prevented from attendance during the whole of this term, on account of indisposition.

1817.

Saturday,  
Jan. 25th.

DUNN v. SLEE.

A surety in an indemnity bond, may bring an action for contribution against his co-surety, although he had given a subsequent security to the obligees, under which he paid the sum conditioned in the bond, without the knowledge or consent of such co-surety.

THIS was an action of *assumpsit* on the common money counts, tried before Mr. Justice *Park*, at the sittings at *Guildhall*, after last *Michaelmas* term. The plaintiff sought to recover a proportionable part of £3000, on an indemnity-bond, which he had entered into with the defendant and two others, under the following circumstances. The defendant's brother, *John Slee*, for the purpose of carrying on his business, as a wine-merchant, had applied to Messrs. *Brown, Hall, and Co.*, bankers, at *Brighton*, to open an account with them, and they agreed to accommodate him to the extent of £3000, provided he gave them proper security to indemnify them against any losses which he might sustain in the course of his business.—In consequence of this, on the 31st of *May*, 1809, *John Slee* prevailed on the plaintiff, and two other sureties, to execute with him a joint and several bond, in the penal sum of £6000, conditioned to indemnify *Brown and Co.* for any sum of money they might advance to him, not exceeding £3000, with a proviso, that three calendar months notice, in writing, should be given by them to the obligors, before any action should be brought on the bond.—In *July* 1814, *Brown and Co.*, doubting *Slee's* solvency, gave notice to the obligors, severally, that there was then due to them, from *Slee*, the sum of £3000; and required payment in three months from the date thereof.—Previous to this notice, one of the co-sureties had become bankrupt, and obtained his certificate. In *December* 1814, the plaintiff, at the urgent request of Messrs. *Brown and Co.*, gave them a warrant of attorney

to confess judgment, with a defeazance for payment of £3000 on the first of *June* 1816:—In *May* 1816, *John Slee* became bankrupt, and Messrs. *Brown and Co.* proved under his commission; and on the 1st of *June* the plaintiff paid them £3000, pursuant to his warrant of attorney, and the bond was thereupon delivered up to him. There was no communication between the plaintiff and his co-sureties when the former gave his warrant of attorney; and *Brown and Co.* refused to give up the bond, or release any of the parties, until the money was actually paid. The defendant resisted payment on two grounds; *first*, that an action by one co-surety against another was not maintainable; and, *secondly*, that the warrant of attorney given by the plaintiff was given in satisfaction and not in aid of the bond, and that consequently the defendant was discharged. The jury gave a verdict for the plaintiff for £891 : 10s : 2d.

Mr. Serjt. *Lens* now moved for a rule to shew cause why the verdict should not be set aside, a non-suit entered, or a new trial granted. He said that this was an equitable action, and that the plaintiff therefore could not recover in point of law, as he had individually given a warrant of attorney to confess a judgment as a new security, in which *Brown and Co.* had consented to give him eighteen months further time for payment, and, as this was done without the knowledge of his co-sureties, he insisted that the defendant was discharged, the security having been changed; at all events the plaintiff had not paid in aid of the original bond but under the judgment, and therefore he could not call on his co-sureties for contribution.

But *per Curiam*, The notice was given by *Brown and Co.* on the 23d of *July* 1814, to all the co-sureties, who were each jointly and severally liable under this bond.—The plaintiff was called on for payment of the whole

1817.  
DUNN  
v.  
SLEE.



1817.

DUNN

v.

SLEE.

amount, when his co-sureties had failed. He has therefore his action against the defendant for contribution, although *Brown and Co.* had given him further time for payment. Rule refused.

Saturday,  
Jan. 25th.

BENNET, and another, v. MOITA.

By the general Pilot Act (52 G. 3. c. 39. s. 30.) An owner or master of a vessel is in no case answerable for an accident, occasioned to another ship, provided he has a pilot on board.—Nor is it necessary to prove, in an action brought against such owner, that the injury arose from the incompetency of his pilot.

THIS was an action on the case, brought to recover a compensation for an injury done to the plaintiffs' ship, by the defendant's brig running foul of her in the river *Thames*. The plaintiffs, who are owners of the ship in question, had a pilot on board, who observing that part of the *Thames*, called the *Pool*, to be crowded with vessels, and the wind then blowing up the river, came to an anchor at *Rotherhithe*, in order to guard against any damage that might accrue from his proceeding further. Having thus anchored, the defendant, being master of the brig, with a pilot also on board, her sails set, and going at the rate of seven or eight knots an hour, came up, when she let go her anchor in such a situation, as on swinging round, to run foul of the plaintiffs' ship, and cause considerable injury to her hull and rigging.—The accident was attributed to the inattention of the defendant, who ought to have shortened sail and dropped the anchor sooner.—The cause was tried before Lord C. J. *Gibbs*, at the adjourned sittings, at *Guildhall*, after last *Michaelmas* term, when the learned judge directed a nonsuit, on the ground that the defendant was not liable, inasmuch as he had a pilot on board at the time the accident happened.

Mr. Serjt. *Best* now moved to set aside the non-suit, and insisted that the action was maintainable against the defendant, as master of the brig.—That it was necessary by the stat. 52 *Geo.* 3, c. 39, s. 30. (a) for the defendant to have proved more than merely having a pilot on board (b). He should have shewn that the accident happened from the incompetency or incapacity of such pilot. It was impossible for the plaintiffs to have ascertained whether the defendant had a pilot on board his brig or not, and therefore he contended that the plaintiff should not have been non-suited.

But, *per Curiam*,—The action should have been brought against the pilot, and not the master. An owner or master of a vessel is in no case answerable if there be a pilot on board.—The ship was under the express control and management of the pilot. During the time he was on board the master and crew were under his direction. It did not appear that the pilot was prevented from doing his duty by the interference of the defendant. The direction of the learned judge was therefore correct.

Mr. Justice *PARK* observed, that the name of the pilot, against whom the action should have been brought, might have been ascertained on making the necessary enquiry at the *Trinity-house* (c).

Rule refused.

1817.

BENNETT  
v.  
MOITA.

---

(a) By which it is enacted, 'That no owner or master of any ship or vessel shall be answerable for any loss or damage, nor shall any owner or owners of any ship or vessel, or consignee of goods, be prevented from recovering any loss or damage upon any contract of insurance of the same, or upon any other contract relating to any ship or vessel, or any cargo on board the same, for or by reason or means of any neglect, default, incompetency, or incapacity of any pilot taken on board of any such ship or vessel, under or in pursuance of any of the provisions of that act.'

(b) No question arose as to either of the pilots having been duly licensed.

(c) See *Carruthers v. Sidebotham*, 4 *M. & S.* 77, and the cases there cited.

1817.

Saturday,  
Jan. 25th.

KEMBLE and others v. ATKINS and another.

A broker is authorised from a previous course of dealing between himself and his principal, on an approval of a purchase by the latter, to make out a contract note in his own name, without inserting that of his principal; and under such circumstances, does not violate the bond and oath imposed on him by the regulations of the city of London, provided he make an entry in his book in the name of his principal.

THIS was an action of assumpsit, tried before Mr. Justice Dallas, at the sittings after last *Michaelmas* term, in which the plaintiffs sought to recover damages, in consequence of a loss upon the re-sale of a quantity of sugars contracted for as a purchase by the plaintiffs, on account of the defendants. The first count of the declaration stated, That in consideration that the plaintiffs, as the agents or brokers of the defendants, for a reward to be therefore paid by the defendants to the plaintiffs, would purchase sugars for the defendants at a reasonable price; the defendants undertook to receive and pay for the same. It then averred that the plaintiffs purchased sugars for the defendants, from persons of the name of *Litt and Co.*, for a reasonable price, which the defendants were requested to receive. Breach, that the defendants would neither receive nor pay for the same, and that in consequence of a fall in the market-price of sugars they were re-sold at a great loss, which the plaintiffs were obliged to pay. The second count stated the consideration to have been executed, and that the plaintiffs had paid for the sugars to the persons of whom they had purchased them. The third count stated, that in consideration that the plaintiffs, at the request of the defendants, would purchase sugars for a reasonable price; the defendants undertook to repurchase the same from the plaintiffs, and pay for them at the same rate as the plaintiffs should buy them. It then averred that although the plaintiffs purchased accordingly, whereof the defendants had notice, yet that the defendants would neither repurchase nor pay for the same, with the same special

damage as in the first count. The facts of the case were as follows:—The defendants, being in the habit of employing the plaintiffs as their brokers, to purchase *West India* produce, requested them to buy the sugars in question; they in consequence applied to Messrs. *Litt and Co.*, who then had the disposal of them. On the 20th *December* 1815, Mr. *Atkins*, accompanied by Mr. *Kemble*, senior, went to a sale-room, where the samples were deposited. Mr. *Atkins* approved of them, and assented to the plaintiffs' purchasing for his house in the presence of Mr. *Litt*. On the following day, after the sugars had been examined, a bought note was sent by the plaintiffs to the defendants, in these terms:

1817.  
  
 KEMBLE  
 v.  
 ATKINS.

21st *December*, 1815.

Bought for *John Atkins, Esq.*, and Son, of Messrs. *Litt, and Steele*,

(in our name,)

57 hogsheads *Jamaica* sugar '1',, per Fife, at 86s.  
 Dock Tare.—No duty. *Thomas Kemble, Son, and Co.*

This note was accompanied by a letter, which stated that the plaintiffs had the contract note made out in their names, as Mr. *Litt*, conceiving that the sugars had been sold to the plaintiffs, had insisted on considering them as purchasers; and on that account had disposed of them at a lower price.—To this letter, the defendants answered, that *Litt and Co.* were not warranted in considering the plaintiffs as buyers, and demanded a contract note from the plaintiffs, as brokers, in the name of their (the defendants') house. On the following day, (*December* 22d), the defendants again wrote to the plaintiffs to the following effect:—'Considering the conduct of '*Litt and Co.* must proceed from a desire to reflect 'on our credit, we beg to know why they insisted

1817.  
 KEMBLE  
 v.  
 ATKINS.

‘on the sugars being put in your name. Mr. *Litt* was present, and knew that we were the buyers.—We beg you, as the brokers who negotiated this purchase, will state to *Litt* and *Co.*, that when the sugars are weighed off, we will, on taking off the interest, pay cash for them, which will remove any doubts they may entertain.’—There was a further correspondence between the plaintiffs and the defendants, in which the former insisted that the contract note was correct as delivered, and the latter refused to purchase the sugars, unless it was made out in their names, and returned the contract note to the plaintiffs. There was afterwards a fall in the market, and the plaintiffs resold the sugars, at a loss of £335: 19s: 4d. for which the action was brought.—The learned judge left it to the jury to determine, whether, from the previous course of dealing between the defendants and the plaintiffs, and what passed between them on the sale of the sugars, the latter had an authority to make out the contract note, on the face of which they appeared to be the buyers from the house of *Litt* and *Co.*, instead of the defendants, or whether the plaintiffs could confer such power. They found that the plaintiffs were authorised so to do; and gave their verdict accordingly.

The *Solicitor-General* now moved that this verdict should be set aside, a new trial granted, or non-suit entered.—He contended that the plaintiffs were not authorised by the defendants to buy the sugars, and that as it appeared on the contract note that the plaintiffs bought in their own names, they must be considered as principals, and that by re-selling to the defendants, they were not only violating their duty as brokers, but acting contrary to their bond and oath. He observed that brokers had, at different periods, been put under particular regulations. The first statute was passed in the reign of *William*, but, that having expired, the only subsisting one

is, 6 *Ann. c.* 16, (a). The court of aldermen have framed their rules and restrictions according to the legislative regulations of this statute, and one of the first regulations was, that no broker should act in any other trade.—It is necessary that every person, on being admitted and sworn a broker of the city of *London*, shall enter into a bond, conditioned, (among other things) ‘That if he (the broker) shall upon every contract, bargain, or agreement by him made, declare and make known to such person or persons, with whom such agreement is made, the name or names of his principal or principals, either buyer or seller, if thereunto required, and shall keep a book or register, and therein fully and fairly enter all such contracts, bargains and agreements, within three days at the farthest, after making thereof, together with the names of the respective principals for whom he buys or sells, and shall, upon demand made, by either of the parties, produce and shew such entry to them; and shall not directly or indirectly by himself, or any other, deal for himself, or any other broker, in buying any goods, wares, or merchandize, to barter or sell again upon his own account, or for his own or any other broker’s benefit or advantage, or make any gain or profit, or buying or selling any goods over and above the usual brokerage; then the bond shall be void.’ The oath has merely reference to the general regulations, as contained in the condition of the bond, and settled by the court of aldermen.—The great object of these regulations, is to prevent brokers from participating in any profit them-

1817.

KEMBLE  
v.  
ATKINS.

---

(a) By section 4 it is enacted, ‘That from and after the determination of that session of parliament, all persons that should act as brokers within the city of *London*, and liberties thereof, should from time to time be admitted so to do, by the court of mayor and aldermen of the said city, for the time being, under such restrictions and limitations, for their honest and good behaviour, as that court should think fit and reasonable.’

1817.  
 KEMBLE  
 v.  
 ATKINS.

selves, and thus induce them to consider solely the interest of their employers. A broker need not declare his principal, unless required so to do; but the name of such principal must be entered in his book,—[Mr. Justice *Dallas*.—The question was whether the plaintiffs, as brokers, were authorised by the defendants to make a contract in their own name, and the jury found that they had a direct authority.] They found a general verdict that the plaintiffs were authorised. The defendants could not authorise the plaintiffs to violate their duty as brokers. They could not make them buyers on their own account. [Mr. Justice *Dallas*. The plaintiffs were the agents of the defendants, and therefore did not purchase on their own account.] If a broker enters one contract in his book, and delivers a note different from such entry, the parties are not bound thereby. The plaintiffs entered the transaction in their book, as a contract made with *Litt*, and *Co.*, as principals, on the one side, and the defendants, as principals on the other. The first count of the declaration treats this contract as a purchase made by the plaintiffs as brokers. Can a broker purchase in his own name? He is prohibited by the regulations. If he does, he is liable to the purchase. If the plaintiffs were entitled to recover from the defendants; *Litt* and *Co.* might bring an action against the plaintiffs for goods sold and delivered. They must, therefore, be liable on their own account as purchasers. If the plaintiffs had bought under a *del credere* commission, the defendants would be liable to *Litt* and *Co.*; but they were not the purchasers from *Litt* and *Co.*, and as the plaintiffs had purchased without the authority, or in the names of the defendants, the verdict must be set aside.

Mr. Justice *DALLAS*.—In this case the question went to the jury, upon the point, whether the house of *Atkins* and

*Co.* had authorised *Kemble* and *Co.* to make the contract in their own name, as being under the employment of the house of *Atkins* and *Co.* The general duty of a broker, in cases where no authority is given, does not furnish a rule where such duty is dispensed with by the conduct of the parties. What were the facts? *Kemble* and *Co.*, being about to purchase sugars, at the request of *Atkins* and *Co.*, informed them, that Messrs. *Litt* and *Co.* had sugars to dispose of which would suit them. Mr. *Atkins* met Mr. *Kemble* for the purpose of examining the sugars, when an equivocal conversation took place, and on that conversation the question went to the jury, whether Mr. *Atkins* had authorised Messrs. *Kemble* to make the contract in their own name, and they found that they had authority so to do.— It has been contended that *Kemble* and *Co.* have violated their bond, by which they were obliged to disclose the names of their principals. They have fully complied with the terms of that bond. All the parties knew the situation in which the plaintiffs stood. *Litt* and *Co.* knew that they were employed by *Atkins*, and the latter was fully apprised that the sugars were purchased for his house.— Messrs. *Kemble* and *Co.* were also required to make an entry in their book, declaring the names of the buyer and seller. This entry was truly made. Then, farther, they were neither to buy or sell for themselves; most undoubtedly they were not to sell property that might belong to them in the character of brokers; but this was a sale of goods belonging to Messrs. *Atkins*. It has been found by the jury, that Messrs. *Kemble* were authorized to buy in their own name, for Messrs. *Atkins*; and therefore, without going into the question, whether the contract would be void under different circumstances, their verdict is conclusive, and, consequently, there is no ground for this application.

1817.  
KEMBLE  
v.  
ATKINS.



1817.  
 KEMBLE  
 v.  
 ATKINS.

Mr. Justice PARK.—The great cause of complaint against brokers, is their dealing as general merchants.—The parties in this cause knew every step of the transaction. *Kemble* tells *Litt* that he has purchased for *Atkins*, and *Atkins* accordingly examines and approves the sugars. The contract is made out in the name of *Kemble and Co.*, by the express desire of Mr. *Litt*, and as the former do not profit by its being so made out, they do not fall within the terms of the bond. The jury have found that the contract was made with the consent of all the parties. I think, therefore, no ground has been stated to induce us to disturb this verdict.

Mr. Justice BURROUGH concurred.

Rule refused.

Monday,  
 Jan. 27.

ZWINGER and another v. SAMUDA.

The warrants of the *West India Dock Company* are equally negotiable as bills of lading, and, when indorsed for a *bona fide* consideration, are deemed equivalent to a delivery of the goods in the company's warehouses.—

Therefore, where a broker had obtained warrants

from *B.*, by a fraudulent payment, and had sent them into the market, where they were purchased by the brokers of *A.*, who paid for the goods, on the receipt of the warrants:—*Held*, that *A.* might maintain an action of trover against *B.*, as the transfer of the warrants by his broker was a constructive delivery of the goods, so as to defeat *B.*'s right of stopping them *in transitu*.

TROVER for thirty casks of coffee.—This cause was tried before Mr. Justice *Park*, at the adjourned sittings after last *Michaelmas* term, when the jury found a verdict for the plaintiffs.—The defendant is a broker, and employed by merchants in the buying and selling of *West India* produce. The plaintiffs are merchants, and purchased the coffees under the following circumstances. When ships have arrived from the *West Indies* and deposited their cargoes in the warehouses of the *West India Dock Company*, the person to whom the goods belong is entitled to receive

from the company a warrant, of which the following is a copy:

Warrant (a).

Ship's Rotation N<sup>o</sup> 32.

West India Dock Warehouse, N<sup>o</sup> 8.

1817.  
ZWINGER  
v.  
SAMUDA.

Weighed the following 5 casks, lot 29, of *coffee*. Imported by the ship *Trent*, captain *Longbottom*, from *Surinam*. Entered by *H. Moses and Son*, on the 25th day of *March*, 1816. Warehouse rent commences on the 26th day of *June*, 1816.

- Weighing-book, }	Dated	1816.
Letter Folio }	Clerk	Captain N <sup>o</sup> 8.

London, 181 .

Deliver the above-mentioned goods to , or order,  
N<sup>o</sup> .

Examined and entered the	day of	181 .
	London,	181 .

The above-mentioned goods to or order.

*N. B.* This order must be presented at the *West India Dock-house*, and all charges are to be paid before the goods are taken away.

The coffees, in question, were imported by *H. Moses and Son*, in the ship *Trent*, from *Surinam*, and entered at the *Custom-house*, in their own names, and the above is a copy of one of six warrants, containing five casks each, given to *Moses and Son*, by the *Dock Company*, shewing that thirty casks were thus entered in their names.— Those warrants having passed through the hands of the persons mentioned in the order for delivery, were ultimately purchased by a Mr. *Roebuck* of Messrs. —, who directed them to make the thirty casks deliverable to

(a) These warrants are printed with blanks for the quantity of goods, name of ship, &c. The part in *italics* is filled up to meet the circumstances of this case.

1817.  
 ZWINGER  
 v.  
 SAMUDA.

*David Samuda*, a younger brother of the defendant.—  
 The coffees in these six warrants, being thus made deliverable to *David Samuda*, he became entitled to have them transferred into his own name, and applied to the *Dock-Company* for that purpose, who, upon having the six warrants delivered up to them, issued a new set of warrants in a different form, and of one of which the following is a copy:

Rotation N° of Order, 660.  
 Warrant of transfer. Ship's Rotation N° 32.  
 West India Dock Warehouse, N° 8.

I certify that the following 5 casks, lot 29, of coffee, imported by the ship *Trent*, Captain *Longbottom*, from *Surinam*, entered by *H. Moses and Son*, on the 25th day of *March* 1816, have been transferred in the books of the warehouse into the name of *David Samuda*.

Rent and charges paid to the 26th day of *June* 1816, inclusive.

Weighing-book. } Dated the 11th *June* 1816.  
 Letter 20, fol. 164. }

Ent<sup>d</sup> Clerk Captain N° 8.

London, 181 .

Deliver the above-mentioned goods to Mr. *A<sup>r</sup> Samuda*, or order.

N° . *David Samuda*.

Examined and entered the day of 1816.

*London*, 19th *August* 1816.

The above-mentioned goods to *H. Coombe and Co.*, or order.

*A<sup>r</sup> Samuda*.

*N. B.*—This order must be presented at the *West India Dock-house*, and all charges are to be paid before the goods are taken away.

Every new purchaser may, upon giving up the warrants handed over to him, have the goods transferred into his

own name, and new warrants granted to him upon paying the rent and other charges upon the goods, together with the sum of one shilling for every warrant of transfer. The defendant having been in the habit of dealing with *Roebuck*, accommodated him with money to pay for the coffees, he being unable to do so; they were then transferred into the name of defendant's brother, *David Samuda*, as his agent, who, on the 18th of *June* 1816, procured the new warrants, as before stated. On the 16th of *August*, *Roebuck* told the defendant, that he had sold the thirty casks of coffee, and requested him to deliver up the transfer warrants upon his, *Roebuck's*, giving him his check for the amount of the coffees, crossed with the names of *Hoare and Co.*, who were the defendant's bankers; *Roebuck* being in embarrassed circumstances, the defendant refused to accept the check as payment, and demanded cash.—*Roebuck* then shewed the defendant a quantity of bank notes, which he said he was then about to send to his bankers, and requested him to take another check, not crossed, which would be duly paid on being presented; the defendant, not doubting *Roebuck's* statement, received the last check as payment, and delivered up the warrants. The check, on being presented at the bankers, was refused payment. The defendant, on discovering the fraudulent conduct of *Roebuck*, applied at the *West-India-Dock-office*, to prevent a transfer of the warrants, in case they should be presented, and on the 17th *August*, delivered a letter to the proper officer, giving him a formal notice, stating the circumstances of the transaction, and forbidding the transfer of the coffees to any person that might apply for them.—Soon after this notice, the *Dock-Company* granted fresh warrants, (duplicates of those which *Roebuck* had fraudulently obtained) in the name of *David Samuda*, who afterwards transferred them to the defendant. *Roebuck* having received the warrants from the defendant, on the

1817.  
  
 ZWINGER  
 v.  
 SAMUDA.

1817.  
ZWINGER  
v.  
SAMUDA.

16th *August*, sent them into the market on the same day, through the medium of the plaintiff's brokers, who were paid for the coffees on receiving the warrants. On the following day the brokers paid over the money for which the coffees were sold, to *Roebuck*, who thereupon absconded. The plaintiffs having been made acquainted with this circumstance, on the 19th, went to the *Dock-house*, to have the coffees transferred into their own names, but found the transfer had been previously stopped by the defendant. On the following day they had a conference with the *Dock Company* Directors, and requested them to transfer the coffees into their hands, offering them any security they might require. The Company said that the defendant was the only person entitled to the coffees, and that they would grant fresh warrants to no one but him. The defendant, in due course, received new warrants, upon giving an indemnity. The plaintiffs, finding they could not obtain the coffees they had purchased from *Roebuck*, through the medium of their brokers, who had been paid for the same, brought their action against the defendant for the recovery of them. The question went to the jury, whether there had been such an actual or constructive delivery of the coffees to the plaintiffs, as entitled them to recover. They determined in the affirmative, and gave their verdict accordingly.

Mr. Serjt. *Best* now moved to set aside the verdict, and have a new trial granted, or the damages reduced. He contended that the *Dock* warrants were not negotiable instruments, and that *the mere transfer* of these warrants did not pass the property to the plaintiffs. *Roebuck* had no property in the sugars, but as trustee for the defendant. They were sold to the plaintiffs for prompt payment. *Roebuck* did not receive the money for the coffees from the plaintiffs brokers, until the 17th *August*, and on the 16th they were undoubtedly the property of the defendant. He dis-

tinguished this from *Harman v. Anderson* (a), and *Hurry v. Mangles* (b), as in those cases there had been an executed delivery, and the goods were in the possession of the purchasers by transfer. Here, the delivery was executory, and it was necessary that something more should be done. The delivery of the warrants to the plaintiffs was insufficient to transfer the right of property in the goods. These warrants should have been delivered to the warehouse-keeper, or the person in possession of the goods, and the delivery would not be complete until the sugars had been paid for. [Mr. Justice *Dallas*.—The plaintiffs had paid for these goods, and received the delivery warrants, which, according to the case of *Harman v. Anderson*, is equivalent to a delivery, without a transfer being made in the Company's books. The defendant trusted *Roebuck*.]—These warrants were not to be construed as similar instruments to bills of lading, as the latter are made transferable by the custom of merchants. In support of this proposition he cited *Lickbarrow v. Mason* (c). Here, there had been no custom to warrant such a construction; and the distinction between bills of lading and instruments of this nature was most ably laid down by Mr. Justice *Buller*, in *Caldwall v. Ball* (d). The delivery of these warrants cannot amount to a delivery of the property.—[Mr. Justice *Burrough*.—Suppose the coffees had been in the possession of the defendant, a payment to *Roebuck* would have been equivalent to a payment to the defendant.]—*Roebuck* having obtained the delivery warrants from the defendant by fraud, nothing could pass by them, and the contract between them was thereby determined. The defendant had nothing to do with the contract between the plaintiffs

1817.  
  
 ZWINGER  
 r.  
 SAMUDA.

---

(a) 2 *Camp.* 243.—(b) 1 *Camp.* 452.—(c) 5 *T. R.* 685.—  
 (d) 1 *T. R.* 216.

1817.  
 ~~~~~  
 ZWINGER  
 v.  
 SAMUDA.

and *Roebuck*. They ought not to have delayed their payment to *Roebuck* until the 17th of *August*; by so doing they trusted to him, and the fraud was detected on the 16th, when the coffees were the property of the defendant. As to the reduction of damages, he observed, that the demand and refusal of the coffees having taken place in *August*, the action of trover was then maintainable.—The jury had given a verdict for £586, as being the value of the coffees in the month of *November*, when in *August* the market-price would have only amounted to £523.

Mr. Justice DALLAS.—I am of opinion that, under the circumstances of this case, no new trial should be granted. The defendant induced *Roebuck* to commit a fraud by hazarding the delivery warrants in his hands. The question is, whether the property passed by these warrants.—If it did not, the most serious inconvenience would be produced. The best evidence to prove the affirmative, is the existence of an usage since the formation and establishment of the *Docks*.—Now, merchants who are in the habit of negotiating those documents, have proved that the property passed by them; and that this practice has been productive of no ill effects.—In this case, the delivery warrants passed to the plaintiffs for a valuable consideration. The *Dock-Company* do not claim a lien on the coffees, the question is wholly between the defendants and *Roebuck*, and the plaintiffs therefore are entitled to recover.

Mr. Justice PARK. I am of the same opinion.—This case depends on its own circumstances.—What are the facts? Because the plaintiffs cannot have an actual delivery of the coffees, they take a symbolical delivery. *Roebuck* having these warrants, the plaintiffs purchase the goods, considering the possession of the warrants as equivalent to a delivery of the property. No distinction can be drawn between this case and that of *Harman v. Anderson*. As to the custom, it has been proved, that a delivery of the

warrants operates invariably as a sufficient transfer of the property, and the usage of a few years is sufficient to establish such a custom.

Mr. Justice BURROUGH.—Custom is entirely out of the case.—Usage has experienced no inconvenience by this mode of transferring property. The defendant himself has created all these difficulties. This was a contract between the plaintiffs and *Roebuck*, to whom the money had been *bond fide* paid. It is immaterial whether such payment was made before the 17th of August or not. The defendant therefore must look to *Roebuck* for an indemnity.

Rule refused.

1817.

ZWINGER  
v.  
SAMUDA.

### MILL v. POLLON.

Tuesday,  
Jan. 28th.

THE plaintiff declared in *assumpsit* against the defendant, as surviving partner of *Lewis Evans*, on the common money counts. Plea, that the plaintiff, in *Trinity* term, 56 G. 3, impleaded the defendant as such surviving partner in the *Court of our Lord the King, before the King himself*, in a certain plea of trespass on the case upon promises, to the damage of the defendant as such surviving partner of £250, on occasion of not performing the same identical promises and undertakings in the declaration mentioned; and that such proceedings were thereupon had in the said court of our said Lord the King, before the King himself; that the plaintiff in that same *Trinity* term, by the consideration and judgment of the said Court of the Bench, recovered against the defendant, as such surviving partner in that plea, £250 for his damages which he had sustained, by occasion of the not performing the said promises and undertakings in the declaration mentioned, whereof the defendant was convicted, as by the record and proceedings thereof still re-

In a plea of former recovery in the King's Bench, it is not sufficient to state that a judgment was recovered in the Court of the Bench, for these words apply only to the Court of Common Pleas, and cannot be construed to extend to the Court of King's Bench.



1817.  
  
 MILL  
 v.  
 POLLON.

maining in the said court of our said Lord the King, *before the King at Westminster aforesaid*, more fully appears; and which said judgment is still in full force, &c. And this, &c. Wherefore, &c.—Special demurrer thereto, that the defendant had pleaded a plea of a supposed judgment recovered by the plaintiff in the court of our Lord the King, before the King himself at *Westminster*, against the defendant for not performing the said promises and undertakings in the said declaration mentioned, and yet the defendant hath not shewn or alleged that the plaintiff recovered any damages against the defendant by that judgment. And that the defendant had by his plea stated and alleged that the plaintiff impleaded the defendant in the said supposed suit in the said court of our said Lord the King, before the King himself, in a certain plea of trespass on the case upon promises to the damage of the defendant as such surviving partner. And that the supposed recovery in the plea mentioned was not warranted by the supposed proceedings therein mentioned and set forth. The defendant joined in demurrer.

Mr. Serjt. *Lens* in support of the demurrer contended *First*, that it appeared by the plea that the damage accrued to the defendant as surviving partner, whereas it should have been stated to have been to the damage of the plaintiff. *Secondly*, that by the consideration and judgment of the court of the *Bench*, the court of *Common Pleas* must be intended. He cited 2 *Inst.* 21, 4 *Inst.* 99, and *Magna Charta* c. 11, to shew that the court of *Common Pleas* was commonly called the *Common Bench* or the *Bench*.

Mr. Serjt. *Blosset*, *contra*, insisted that the first objection was ineffectual, because it must now be presumed that such mistake was in the declaration in the former action, and not having been taken advantage of either by demurrer or by writ of error, and it being alleged in this plea that the

plaintiff did recover £250 for his damages, it is sufficient to infer that the proceedings were regular, and that such judgment would still remain in force although the declaration were bad. As to the second, he relied on the case of *Impey v. Taylor (a)*, as being undistinguishable from the present, where Lord *Ellenborough* said, the words court of the *Bench*, might be equivocal, and that the court of *Common Pleas* was designated by the local appellation of "at *Westminster*."

1817.  
MILL  
v.  
POLLON.

But, *per Curiam*.—The court of *King's Bench* has never been known by the style of Court of the *Bench*. The placitum of the record, is in that court before the King himself, in this, before the Lord Chief Justice. This is certainly an ambiguous plea.

Judgment for the plaintiff.

---

(a) 3 M. & S. 166.—See also *Renalds v. Smith*, 2 Marsh. 258.

---

BENSON v. SCHNEIDER and another.

Tuesday,  
Jan. 28th.

THIS was an action, of *assumpsit* brought by the plaintiff as owner of a vessel, called the *Canada*, to recover from the defendants as freighters of that vessel the amount of damages alleged to have been sustained in consequence of the defendants having omitted to load a full cargo under the stipulations of a charter party, dated the 9th day of *January* 1815, by which it was agreed between the plaintiffs and the defendants, "That the *Canada* should proceed from *London* to *Charleston*, and there load from the factors of the freighters a full cargo of cotton-wool, rice, or other goods, and being so loaded

Where, by a charter party of affreightment, the freighters covenanted to provide for the ship a full cargo, consisting of cotton wool, rice, or other goods, on which separate rates of freight were to be paid:—*Held*, that it was the duty of such freighters to have shipped goods according

to the custom of the country from whence they were imported, although the shippers were put to an expence by so doing, and such shipment would exceed the stipulations contained in the charter party.

1817.  
 BENSON  
 v.  
 SCHNEIDER.

should proceed to *Cork* or *Liverpool*, and thence if required to certain other parts therein mentioned, and there deliver her cargo on being paid freight for cotton-wool, in round bales, at  $2\frac{1}{2}d.$  per pound, for cotton-wool in square or compressed bales,  $2\frac{1}{2}d.$  per pound net, and for rice,  $\pounds 7$  per ton net, as far as 150 tons. That on the arrival of the ship off *Charleston-bar*, the master should give notice to the agents of the freighters, and if required by them, in writing, he was to proceed to *New Orleans*, and there to load from the factors of the freighters at that port, a full cargo of cotton-wool, or other goods as beforementioned, subject in all respects to the same conditions as if the ship loaded at *Charleston*, excepting, that in the latter case, the following rates of freight were to be paid, *viz.* for cotton-wool, in round bales,  $3d.$  per pound; for cotton-wool in square, or compressed bales,  $2\frac{1}{2}d.$  per pound net, and for rice  $\pounds 8: 6s.$  per ton, net, as far as 150 tons.—The declaration alleged that the vessel set sail, and having arrived off *Charleston-bar*, the master gave notice to the defendant's agents, who ordered him to proceed to *New Orleans*, where he arrived, and was ready to load on board the vessel from the defendant's factors, a full cargo of cotton-wool, &c. according to the terms of the charter party, and assigned for breaches, *first*, that neither the defendants, or their agents, would provide a full and complete cargo of cotton-wool, &c.; but dispatched the ship with a small and insufficient cargo, and, *secondly*, that part of the freight was unpaid, contrary to the stipulations of the charter party.—There were two other counts for the hire of the vessel, and the common money counts.—The defendants pleaded the general issue.

At the trial of the cause before Mr. Justice *Burrough* at the sittings after last *Michaelmas* term, it was proved that the mode of compressing bales of cotton at *New Orleans* was different from that at *Charleston*, as at the

former place they were recompressed by machines erected on the shore for that purpose. That the owner of the cotton paid the expences of carrying it in compressed bales to the machines, and that the recompression was at the expence of the shippers. That the captain had received on board 170 bales in a compressed state, and had refused to ship the remainder, unless they were recompressed. That if the cotton had been put on board in square compressed bales, the cargo would have been sufficient. The vessel had been surveyed, when it appeared that there was a deficiency of 170 bales, for the dead freight of which the action was brought. The learned judge was of opinion that it was the duty of the defendant's agents to have shipped a full cargo of recompressed cotton, and the jury gave a verdict for the plaintiff.

Mr. Serjt. *Lens* now moved that a new trial might be granted, a nonsuit entered, or the damages reduced.—He stated that the only question was, whether from the terms of the charter-party there had been a full and complete cargo shipped on board the *Canada*. He insisted that the charter-party having expressly stipulated for the loading of round, or square or compressed bales, no custom could be admitted or superadded to compel the loading of recompressed bales. The defendants have shipped a full and complete cargo of compressed bales, and thereby sufficiently complied with the terms of the charter-party. All cotton is shipped in round or square bales; the round bales are not compressed,—the square bales are shipped by the growers in a compressed state at *Charleston*, but at *New Orleans* are re-compressed at the expence of the shippers. As therefore the captain had received a quantity of square compressed bales on board at *New Orleans*, without being recompressed, he contended that the defendants were not liable.

But, *per Curiam*.—Where a vessel is chartered to take

1817.

BENSON

v.

SCHNEIDER.

1817.

BENSON

v.

SCHNEIDER.

on board a full and complete cargo of cotton-wools, it has been an invariable custom, at *New Orleans*, to recompress the bales.—The description of the bales, in the charter-party, only distinguishes the difference of the prices in those which are round and those which are compressed. The contract is, that the ship shall have a full cargo of cotton-wool, and as by means of recompression, she might have taken a greater quantity on board, the defendants have not complied with the terms of the charter-party.

Rule refused.

Friday,  
Jan. 31st.

BYLAND and wife v. KING.

An affidavit of debt, stating that defendant is indebted to plaintiffs in the sum of £3000, for principal and interest due on a bond, is sufficient to express that such bond is conditioned for the payment of money, without setting forth the condition.—  
If an assignee of a bond, positively negative a tender in bank notes, it is unnecessary for the obligee to join in such affidavit.

THE defendant, in this case, was held to bail on the following affidavit of debt.—*John Naylor*, of &c., maketh oath and saith, that *John King* is justly and truly indebted to *Francis*, Count *Byland*, and *Isabella*, Countess *Byland*, his wife, in the sum of £3000, for principal and interest, due on a bond, bearing date the 7th day of *December* 1810, and made and entered into by the said *John King*, to the said *Francis* Count *Byland*, and *Isabella*, Countess *Byland*, his wife, in the penal sum of £6000, and which said bond has been duly assigned to this deponent; and this deponent further saith, that no offer has been made to pay the said sum of £3000, or any part thereof, in any note or notes of the Governor and Company of the *Bank of England*, expressed to be payable on demand.

Mr. Serjt. *Lens*, on the first day of this term, obtained a rule to shew cause why the bail-bond should not be cancelled, and the defendant discharged upon entering a

common appearance, on the grounds of insufficiency in the affidavit.—He founded his motion on two objections: *First*, That it did not appear by the affidavit, that the bond, on which the defendant had been arrested, was conditioned for payment of money.—*Secondly*, That the tender of the sum sworn to was not negated by either of the plaintiffs who were then in this country, but by *Naylor*, as their assignee.

Mr. Serjt. *Best* now shewed cause against the rule, and insisted that the affidavit was sufficient;—as to the *first* objection, he stated, that there was no instance in which the condition of a bond was required to be set out. That this affidavit did not differ from the precedents in cases of this description, and that it fully appeared upon the face of it, that it was not taken either for a penalty, or for performance of covenants; but that the words principal and interest were sufficient to shew that the bond was conditioned for payment of money.—As to the *second* objection, the learned Serjeant contended that it was sufficient for an assignee to negative a tender to the obligees to the best of his knowledge and belief, but in this case he had gone further, and sworn positively as to the fact of there having been no tender.

Mr. *Solicitor-General*, Mr. Serjt. *Lens*, and Mr. Serjt. *Onslow*, in support of the rule submitted, *First*, That it was not sufficient that the instrument only should appear on the face of an affidavit, but that the nature of such instrument should be fully stated.—That it was not enough to swear that the defendant was indebted to the plaintiff for goods bargained and sold, without alleging that they were delivered (a).—They contended, that if the words principal and interest had been omitted, the affidavit would have been equally good.—A party cannot arrest on a bond

1817.  
BYLAND  
&  
KING.

---

(a) *Hopkins v. Vaughan*, 19 E. R. 398.

1817.  
 ~~~~~  
 BYLAND  
 •  
 KING.

for the payment of money, unless the affidavit state that the bond be conditioned for such payment. In the precedents it is stated, for principal and interest, conditioned for the payment of money and interest. This therefore comes within the case of *Hopkins v. Vaughan*. They relied on the case of *Bosanquet v. Fillis (a)*, where it was held that an affidavit, stating the defendant to be indebted to the plaintiff in £6000, (not being the *penal sum*) upon a bond, bearing date, &c. in the penal sum of £25,000, without setting forth the condition, was insufficient. So in *Willey v. Thornton (b)* it was determined that an affidavit for a sum certain for the breach of an agreement, must shew that the sum demanded is stipulated damages, and not merely a penalty.—*Secondly*, they insisted that it was insufficient to negative a tender by an assignee. That the person to whom the legal debt was due, must, himself, negative a tender, except in cases where he resides abroad, when it may be done by an agent or clerk, and they cited *Smith v. Tyson (c)*, and *Hammersley v. Mitchell (d)*, to shew that a clerk cannot absolutely negative a tender.

Mr. Justice DALLAS.—This affidavit seems to be drawn from former precedents, and professes to be on a bond for principal and interest, which is sufficient to express that the bond is conditioned for the payment of money. The case of *Bosanquet v. Fillis* is very distinguishable from the present, for in that case there was nothing to shew that the bond was conditioned for payment of money, it might therefore have been a bond for securing the performance of a covenant or agreement. It has also been objected that the tender should have been negatived by the original obligees. Since the cases which have

---

(a) 4 M. & S. 330.—(b) 2 E. R. 409.—(c) 2 B. & P. 339.  
 (d) 2 B. & P. 389.

been decided on this subject, the affidavit need not be so particular, for by the stat. 43 *Geo. 3, c. 18, s. 2*, it is enacted, That "if one party negative a tender, the other party must swear that such tender has been duly made." The assignee, therefore, in this case, swears that no tender has been made. But if an agent swears positively, and expressly negatives a tender to the principal, as the assignee has done here, it is sufficient. This doctrine was laid down in the cases of *Chatterley v. Finck (a)*, *Hollings v. Finck (b)*, *Smith v. Tyson (c)*, and *Knight v. Keyte (d)*, where it has been decided that a clerk might negative a tender, if he had a knowledge of the fact. Although it is usual for an assignee and obligee to join in an affidavit, yet the affidavit of the assignee being positive, the informality is thereby cured.

Mr. Justice PARK mentioned the case of *Loveland v. Bassett*, from a note of Mr. Ford, in 1742 (e), where an assignee of a bond swore that the obligor was indebted in £90, for principal and interest upon a bond, as he believed, which was deemed sufficient.

Mr. Justice BURROUGH concurred.

Rule discharged with costs.

1817.  
BYLAND  
v.  
KING.

---

(a) 2 B. & P. 390.—(b) *Ibid.*—(c) *Ibid.* 339.—(d) 1 E.R. 415.—(e) 1 Wils. 222.



1817.

Friday,  
Jan. 31st.

FREE and others v. HAWKINS.

Where the defendant's attorney, not having received instructions as to the nature of the defence to an action, pleads a sham plea, and afterwards swears to merits, the court will allow such plea to be withdrawn on terms.

MR. Serjt. *Best* shewed cause against a rule obtained on a former day in this term, for leave to withdraw the defendant's plea of a recognizance in this court, and to plead issuably, *de novo*. The ground on which he relied, was, that the defendant intended to avail himself of a mere legal objection, *namely*, the due notice of the dishonour of a promissory note, drawn by Sir *R. Salusbury*, who had since become bankrupt, and indorsed by the defendant to the plaintiffs. He insisted that a defendant could in no case, in this court, withdraw a sham plea, and plead issuably.

But on an affidavit of the defendant's attorney being produced, swearing to merits, and stating that he had been induced to plead the recognizance, in order to gain time, and for want of having received instructions from the defendant, who lived in *Wales*, as to the nature of the defence, which he now believed to be good:—The court, on the defendant's agreeing to plead the general issue, trying after term with judgment of the term, and paying the costs of the application, made the

Rule absolute (a).

---

(a) But see *Ellis, q. t. v.* —, 2 *Wils.* 369.

1817.

REID and others, v. ELLIS.  
Same ——— v. CORNFOT.

Monday,  
Feb. 3d.

MR. Serjt. *Onslow* moved to justify the same bail in both these actions, which were brought by the plaintiffs against *Ellis*, as the drawer, and *Cornfoot* as the acceptor of a bill of exchange, for £250.

Where the same persons are bail in two actions on the same bill of exchange, they are only bound to justify in double the amount of the sum sworn to in each action, and not in double the amount of the sum sworn to in both actions.

Mr. Serjt. *Blosset* opposed their justification, on the ground that they must justify in £1000, in each action, being double the amount of the debt sworn to in both actions.

But the court permitted them to justify in £500 in each action, as, if the plaintiffs should recover against the drawer, the action against the acceptor would be thereby determined (a).

---

(a) But see *Field v. Wainwright*, 3 B. & P. 39.

---

LUCAS, and others, assignees of DOORMAN, a bankrupt,  
v. DORRIEN, and others.

Monday,  
Feb. 3d.

THIS was an action of trover for sugar and molasses, and for an indenture of lease, bearing date the 23d July

Where *A.* having occasion to borrow money of *B.*, leaves with him as a collateral security,

warrants of the *West-India-Dock-Company* for sugars, deposited in their warehouses, and entered in his name in their books, and afterwards becomes bankrupt.—*Held*, that *A.* had not such a possession of the sugars as would enable his assignees to maintain trover for them, as the transfer of the warrants was a complete transfer of the possession before the bankruptcy, so as to take the case out of the statute, 21 Jac. 1, c. 19, s. 11.

If a customer deposits a lease with his bankers, without stating for what purpose it is left, and afterwards becomes bankrupt.—*Held*, that the bankers have not a lien on it, in order to secure the payment of their general balance, and that the assignees may maintain an action of trover for its recovery.

1817.  
 ~~~~~  
 LUCAS  
 v.  
 DORRIEN.

1804.—The declaration contained counts, laying the possession in the bankrupt before his bankruptcy, and in the plaintiffs, as assignees since. The defendants pleaded the general issue.

The cause came on for trial at the sittings at *Guildhall*, after last *Trinity* term, before Lord Chief Justice *Gibbs*, when the jury found a verdict for the plaintiffs, for £12,000 damages, subject to the opinion of the court, upon a case of which the following is the substance.

On the 4th of *January* 1815, the bankrupt applied to the defendants, who were his bankers, to advance him £10,000 upon his promissory note, and the collateral security of certain sugars, then lying in warehouses of the *West-India-Dock-Company*. The defendants being satisfied with the securities, agreed to advance the £10,000, whereupon a promissory note for that sum was drawn and signed by the bankrupt, and delivered to the defendants, together with the *Dock-checks* for such sugars (which were all duly indorsed by the bankrupt); part of these sugars were afterwards sold, by mutual consent, and the net proceeds placed to the credit of the bankrupt's banking account with the defendants, and other parts were, at the bankrupt's request, exchanged for certain quantities of molasses, then lying also in the *Dock Company's* warehouses, and the *Dock-checks* for such molasses were in like manner indorsed by the bankrupt, and delivered to the defendants. The bankrupt's note became due on the 11th of *February* 1815; but it then being inconvenient for him to pay it, the defendants, at his request, agreed to continue their advance for one month longer, upon the bankrupt's renewed promissory note for the like sum, and the collateral security of certain sugars and molasses to be specified on the back of such note. On the 23d of *February*, a note, of which the following is a copy, was accordingly drawn and signed by the bankrupt.

London, 23d Feb. 1815.

One month after date, I promise to pay to Messrs. *Dorrit, Magens, and Co.*, ten thousand pounds, value received, with interest.—Certain sugars and molasses, as specified on the back, being left as a collateral security.

C. C. Doorman.

The indorsement was in these terms,

5 Hogsheads of crashed sugar,  
30 Hhds. packed sugar,  
13 Hhds. clayed sugar,  
17 Hhds. 252 casks, 8 Hhds. of molasses.  
19 Barrels, D°.  
4 D° 13 Hds of clayed sugar.

This note was delivered to the defendants, together with the *Dock-checks* for the sugars and molasses, which checks were all duly indorsed by the bankrupt. Among these sugars and molasses, were 252 casks, 8 hogsheads and 19 barrels of molasses, in which quantities were included, 51 hogsheads and 156 casks of molasses.—The only matters in dispute, between the parties, were the 51 hogsheads and 156 casks of molasses, referred to in several *Dock-checks*, of one of which the following is a copy :

This is to certify, that the undermentioned order, for goods deposited in warehouse N° , of the *West-India-Dock-Company*, has this day been lodged with me.

| No of order. | Marks or lots. | Description of goods. | Ship. | Master. | By whom granted. | In whose favour. |
|--------------|----------------|-----------------------|-------|---------|------------------|------------------|
|              |                |                       |       |         |                  |                  |

Given under my hand, this 4th day of February, 1814.

(Signed)

West-India-Dock-house.

Clerk.

1817.

LUCAS  
v.  
DORRIT.

1817.  
 {  
 LUCAS  
 v.  
 DORRIEN.

*N. B.* To prevent delay, parties lodging orders for the delivery of goods, at the *Dock-house*, are desired to present at the same time this check, filled up, and ready for insertion of the number of the order and the clerk's signature, which will greatly promote dispatch.

On the back of each warrant was indorsed,  
 Deliver the within-mentioned goods to  
 , or order.—Warehouse-rent thereon from  
 to chargeable to  
 (Signed) for *Gideon Acland, & Co.*

*R. Reynolds.*

(Signed) *Charles Cammeyer Doorman.*  
*Dorrien & Co.*

✍ Every subsequent indorsation must be exactly conformable to the above.

On the 2nd of *March* 1815, the bankrupt suspended his payments, which circumstance was unknown to the defendants, until the 4th; on the 7th the defendants applied, by their clerk, at one of the *Dock-warehouses*, and produced two of the before-mentioned checks so deposited by the bankrupt, one for 51 hogsheads, the other for 19 barrels of molasses, which checks, with their indorsements, were examined by the warehouse-keeper, who, after comparing them with the company's books, said that they were sufficient for the delivery of the molasses.—The duties on the 19 barrels being paid, they were delivered to the defendants, on the 9th; but the duties on the 51 hogsheads not being paid, they remained in the warehouse;—on the 7th, the defendants clerk applied at another of the warehouses and produced two more of the *Dock-checks*, one for 120 casks, the other for 20 casks of the molasses, which checks were in like

manner examined and compared by the warehousekeeper, who said that they also were sufficient for the delivery of the molasses; but the duties on the 129 casks, and 20 casks not being then paid, the delivery of them was not required, and they remained in the warehouse. On the same day, the clerk applied at another of the warehouses, producing another of the *Dock-checks* for 52 casks of the molasses, which checks being examined and compared by the warehouse-keeper, he answered that he saw no objection to the delivery of the molasses. The duties on 35 casks, (part of the 52 casks) were paid on the 9th, and on that day, the 35 casks were delivered to the defendants. On the 10th, the duties were paid by the defendants on 80 casks, (part of the 129 casks), and on the following morning, the defendants clerk was sent for them, but the delivery was refused, he being told that a commission of bankrupt had been issued against *Doorman*, and that no more of the molasses would be delivered without the consent of the assignees. No application was made by the defendants to obtain a re-housing of any of the sugars and molasses, of which the *Dock-checks* were so indorsed and delivered to them on the 4th of *January*, and on the 23d of *February* 1815, nor was any part of such sugars and molasses transferred into the defendants names in the books of the *West-India-Dock-Company*, but the whole remained in the name of the bankrupt. Some months previous to the 10th of *March* 1815, the bankrupt applied to the defendants, and producing a lease, requested them to advance him money on it, which they declined, but he left it with the defendants, without making any declaration of his reasons for so doing, where it remained uninclosed until the 20th of *March*, when a commission of bankrupt was issued against *Doorman*, on an act of bankruptcy committed by him on the 8th; but of which act of bankruptcy the defendants

1817.  
 {  
 LUCAS  
 v.  
 DORRIEN.

1817.  
 {  
 LUCAS  
 v.  
 DORRIEN.

were ignorant, until the commission had been issued. On the 10th, a provisional assignment was duly executed to *John Billing*, who, on the same day, gave notice to the *Dock Company* of such commission and assignment; on the 25th, an assignment was duly executed by the commissioners, and the provisional assignee, to the plaintiffs; on the 26th, the bankrupt's renewed note for £10,000 became due and was not paid.—By an agreement between the parties, the lease had been sold by the plaintiffs for £1218, and the molasses by the defendants for £1144 : 2s : 5d, which sums were to be accounted for by the parties respectively, as the verdict in this action should be finally entered. At the time of the issuing of the commission, there appeared, upon the face of the bankrupt's banking account, with the defendants, to be a balance of £866 : 1s. in favour of the bankrupt; but in such account the bankrupt's renewed unpaid note of £10,000 was not included.—After debiting the banking account with this note, and certain payments since made by the defendants, and after crediting it with monies since received by them, in respect of the collateral securities, there was a final balance due to the defendants from the bankrupt's estate of £3499 : 1s : 11d., for which they held no security, nor did they possess any claims in respect thereof, other than upon the net proceeds of the lease and the dividends which might be payable under the commission; the net proceeds of the molasses so sold by them under the written agreement, being comprehended in the final balance of £3499 : 1s : 11d.—The molasses and lease having been disposed of by mutual consent, prior to the commencement of this action, such disposition thereof was to be considered as equivalent to a demand and refusal.

The questions for the opinion of the court, were, Whether the plaintiffs were entitled to recover for the molasses, or any, and what part thereof; and whether

they were entitled to recover for the lease?—If the plaintiffs were entitled to retain the verdict, the amount of the damages to be settled according to the rule which the court should be pleased to pronounce; if not, a nonsuit to be entered.

1817.  
  
 LUCAS  
 v.  
 DORRIEN.

The case came on for argument, this day, when Mr. Serjt. *Best*, for the plaintiffs, without advertng to the lease, divided his argument as to the molasses, into two parts.—*First*, he contended, That the warrants of the *West-India-Dock-Company* did not amount to an absolute, but merely a symbolical delivery. He distinguished the present case from that of *Zwinger v. Samuda* (a), as there, an agent was entrusted, and the rights of a third person were thereby affected. Here, the contract was immediate, and between the original parties. He said this was a case of pledge, and that it was therefore necessary, that the property should be actually delivered to the pawnee. Has the property in this case been transferred previous to the bankruptcy? Although the transfer of the warrants took place before, yet nothing was done to reduce the property into possession until afterwards. The notice given to the warehousekeeper, was immaterial and insufficient. The possession was not complete until actual delivery, and it was necessary that a transfer should be made in the books of the *Dock-Company*, when the property was in the possession of the person to whom such transfer was to be made.—[Mr. Justice *Dallas* mentioned the case of *Harman v. Anderson* (b), where it was determined, that if the vendee receive from the vendor an order for the delivery of goods which he lodges with the wharfinger, the same effect is produced, as if a transfer were made in the wharfinger's books.]—In that case the goods had been transferred into the name of the purchaser. The defendants, from that moment, became trustees for the pur-

---

(a) *Ante*, p. 12.—(b) 2 *Camp*. 243.



1817.  
  
 LUCAS  
 v.  
 DORRIEN.

chaser, and there was an executed delivery, as much as if the goods had been delivered into his own hands. The note was there lodged with the wharfinger. The notice, therefore, in this case, does not operate as a transfer.—*Secondly*, he insisted, That if the transfer did not amount to a delivery, the actual possession was in the bankrupt, and, therefore, within the stat. 21 *Jac.* 1, *c.* 19, *s.* 11 (*a*).—The sugars were in the apparent possession of the bankrupt.—Suppose he, having pledged them, had proposed to sell them to a third person, and had referred such third person to the books of the *Dock-Company*, the goods would have been ostensibly the bankrupt's, and entitled him to credit.—He cited *Horn v. Baker* (*b*), and relied on that case as an authority to shew that it was unnecessary for the bankrupt to have an absolute ownership, but that the apparent possession was there held to be sufficient to pass the property to the assignees. [Mr. J. Burrough.—In that case the bankrupt was in the actual possession of the property.]—So here, the *Dock-Company's-warehouses* may be considered as the warehouses of the bankrupt. The principle is precisely the same. He then cited the case of *Lickbarrow v. Mason* (*c*), which was decided by a special finding of the jury, that a bill of lading was negotiable and transferable by the usage and custom of merchants, and contended that *Gordon v. The East India Company* (*d*) was not distinguishable from this case, either in principle or cir-

---

(*a*) By which it is enacted, “ That, if any person or persons shall become bankrupt, and at such time as they shall so become bankrupt, shall by the consent and permission of the true owner and proprietary have in their possession, order and disposition, any goods or chattels, whereof they shall be reputed owners, and take upon them the sale, alteration, or disposition as owners, that in every such case, the said commissioners, or the greater part of them, shall have power to sell and dispose of the same, to and for the benefit of the creditors, which shall seek relief by the said commission, as fully as any other part of the estate of the bankrupt : and for the better payment of debts and discouraging men to become bankrupts.”

(*b*) 9 *E. R.* 215.—(*c*) 5 *T. R.* 682.—(*d*) 7 *T. R.* 228.

cumstances. He referred to the case of *Thackthwaite v. Cock (a)*, and inferred that as the molasses appeared to the world to be the property of the bankrupt, it would, in effect, repeal the statute of *James*, if it should be decided otherwise. It was immaterial whether the property were on the premises of the bankrupt, or in the *Company's* warehouses. The bankrupt paid rent to the *Company*.—Until the assignees had the sugars transferred to them, they were not liable, and the *Company* could not be considered as their agents. He submitted that laws must be suited to the circumstances of the times. It was the duty of the defendants to have used due diligence, and caused the molasses to be transferred into their own names. The legal principle of the cases cited, is to give effect to the statute, and although they may, in some circumstances, be distinguishable, still, as the bankrupt here appears the owner, the assignees are entitled to recover.

Mr. Serjt. *Pell, contra*.—In this case there are two distinct points, *First*, as to the molasses, *Secondly*, as to the lease. With regard to the first, the cases cited do not apply, as the defendants had advanced the money to the bankrupt, previous to the bankruptcy, and had taken the *Dock-warrants* as a security for such advance, and on producing those warrants at the *Dock-Company's-warehouses*, they had been informed, that they were correct documents, and sufficient to transfer the property. This, he observed, was a very important question of commercial law; no analogy could be drawn between this case, and that of *Gordon v. The East India Company*.—The *Dock-warrants* are strictly in the nature of public instruments. Their express purpose is to assign goods, which by statute must be lodged in the *Company's-warehouses*, before they can be disposed of. The person to whom the property

1817.  
  
 LUCAS  
 v.  
 DORRIEN.

---

(a) 3 Taunt. 487.

1817.  
 ~~~~~  
 LUCAS  
 v.  
 DORRIEN.

may be thus assigned, cannot obtain possession of it by any entry in the books of the *Company*, but the warrant alone is the necessary instrument; on the production of which, the goods are immediately transferable. By the transfer of the warrant, therefore, there is a transfer of the property.—A purchaser of property in the *Docks*, is not compelled to see how it stands in the *Company's* books. The *Dock-warrants* are to be considered precisely similar to bills of lading, and equally as negotiable and transferable. He relied on the case of *Spear v. Travers* (a), as being precisely in point, and wholly undistinguishable from the present, where it was decided that goods having been entered in the books of the *West-India-Dock-Company*, in the name of *A.*, who received the usual check for them, which, having sold the goods to *B.*, he indorsed and delivered to him; and *B.*, having re-sold the goods and delivered the check to *C.* on credit; on *C's* insolvency, *A.* could not take possession of the goods, although they had continued to stand in his name, and the check had not been lodged with the *Dock-Company*, and in a note of Mr. *Campbell's* subjoined to that case, a special jury had observed, that in practice, the indorsed *Dock-warrants* and certificate were handed from buyer to seller, as a complete transfer of the goods.—In order to bring this case within the statute of *James*, it is necessary, that the owner of goods must have the order and disposition of them, if they be not in his actual possession or occupation.—The possession, in this case, was only constructive, for the bankrupt had parted with the warrants, which only could have given him possession of the property. He distinguished this case from those of *Horn v. Baker*, of *Gordon v. East-India-Company*, and of *Thackthwaite v. Cock*, as in the first the trader had the goods, and was allowed to remain in possession.—The second

---

(a) 4 Camp. 251.

was in direct contravention of the laws of the *East-India-Company*, and the third depended on a custom of merchants to contravene a particular statute.—*Secondly*, with respect to the lease, it was left with the defendants as the bankers of the bankrupt generally, and without his mentioning for what purpose it was so deposited. If they had advanced money thereon, they would most clearly have a lien on it, and it is therefore a question, whether they might not have retained it, in order to secure the payment of their general balance. He cited Lord *Kenyon's* judgment, in *Davis v. Bowsher* (a).

Mr. Serjt. *Best*, in reply, observed, That the case of *Spear v. Travers*, was decided on a distinct and different ground from the present; for Lord Chief Justice *Gibbs* did not there deliver his judgment as to the effect of the transfer, but on the grounds of falsehood and fraud. The defendants there had been paid for the goods by the plaintiff, and they afterwards endeavoured to cheat him, by improperly protecting a third person, whom they had put in possession. He remarked there was a wide distinction between practice and usage.—Lord *Kenyon* in the case of *Lickbarrow v. Mason*, had held, that usage was the law of the land. The *Dock-warrants* could not be so deemed, as they had existed but a few years. He considered that the words of the statute of *James*, must not be construed literally, but according to their obvious meaning.—That if goods appeared to be in the ownership of the bankrupt, it was sufficient to bring it within the statute.—Since the establishment of the *Docks*, their warehouses must be considered as the warehouses of private individuals, and the defendants therefore should have inspected the books of the company to have ascertained whether the molasses were then in the possession of the bankrupt or not.

1817.  
 ———  
 LUCAS  
 v.  
 DORRIEN.

---

(a) 5 T. R. 491.

1817.  
 {  
 LUCAS  
 v.  
 DORRIEN.

Mr. Justice DALLAS.—If I now entertained the least doubt, I should wish this case to be argued again; but having listened with very great attention to the cases which have been cited, and the arguments drawn from those cases, I must confess my scruples are completely removed. The facts of this case are comprised in a narrow compass.—[Here the learned judge briefly recapitulated the leading circumstances.]—It is material to remark, that the act of bankruptcy took place on the 8th of *March*, and that the application at the *Dock-office*, was on the 7th, and if that were the fact, the delivery would be complete before the bankruptcy; but the case does not rest here.—On the exhibition of the warrants to the clerk of the *Dock-Company*, he said they were sufficient to transfer the property. In point of fact, therefore, the *Company* had notice by their agent, and assented to the transfer, before the bankruptcy; and on the authority of *Harman v. Anderson*, became trustees of the person who had given notice. It is not necessary, in this case, to determine, whether property passes by the mere delivery of the warrants, and though I might feel no doubt in deciding the general question, I wish in prudence not to go beyond the facts, which are here narrowed to this point, namely, Whether, as against the individual who has given value and shewn the warrants to the person in possession of the bankrupt's property, the assignees can claim under the commission. This case is distinguishable from every other, except that of *Spear v. Travers*. The form of the securities is special. Sugars must be deposited in the *Dock-warehouses*, as a place of public security; therefore, the form of the warrant is adapted to the circumstances of the case. It contains a formal indorsement. What can be stronger than this, to shew that it is intended to pass by indorsement, and that the party in possession may transfer? What are the principles of this case? The justice of it can-

not be doubted, the assignees must stand in the situation of the bankrupt. Lord *Ashurst* has laid it down as a rule in the case of *Lempriere v. Pasley* (a), that whatever binds a subject of property in the hands of the bankrupt will bind it in the hands of the assignees; their title is merely derivative, and they take the property of the bankrupt subject to all equitable liens on it that bound it in the hands of the bankrupt. That decision applies most particularly to this case. It has been urged that independently of the form of the indorsement, the property must be actually delivered. If a trader make an assignment of a collateral security on goods at sea, and undertake to assign bills of lading, and become bankrupt, it is good, as against the assignees. Supposing the legal estate to be in the bankrupt, he had parted with it, and the beneficial estate is vested in the creditors.—As to this part of the case there can be no doubt. It was unnecessary that the transfer should be made in the *Company's* books. It falls within the principle of *Spear v. Travers*. The notice to the clerk was sufficient, and his assenting to such notice might be proved by his own evidence.—The next point is on the statute of *James*, whether the goods were in possession of the bankrupt as reputed owner.—Supposing my decision in the former part of the case to be correct, this will be disposed of. These goods were not in the possession of the bankrupt. What is necessary to constitute a reputed ownership?—Mr. Justice *Lawrence* has held that it was a question for a jury to determine. On what principle was the statute passed?—To protect property in the possession of the bankrupt as an ostensible owner.—The bankrupt here had neither the actual, nor the legal possession. The notice and assent of the clerk determined the legal possession;—no man could say he was reputed owner.—

1817.  
 {  
 LUCAS  
 v.  
 DORRIEN.

---

(a) 2 T. R. 495.

1817.  
 ~~~~~  
 LUCAS  
 v.  
 DORRIS.

Special juries having found that those warrants pass property without usage or practice, there can be no ground for saying that they will not be sufficient to take the case out of the statute.—The cases cited do not appear applicable to the present question, and whether we consider this case, either with respect to the justice or the law of it, the defendants are entitled to judgment.

Mr. Justice PARK.—If this case were to overturn any of those cited, or infringe on the statute of *James*, I might have some hesitation in delivering my judgment, but the decision of my brother *Dallas* will not affect either; as to the statute, we must decide on principle, and not on facts. The principle has been ably and fully stated by Lord *Ellenborough*, in the case of *Horn v. Baker*, to which I wholly accede.—My brother *Best* has assumed a fact that does not exist, namely, that the reputed ownership was with the bankrupt.—Nothing more could be done to transfer the property. An entry on the *Dock-books* is unnecessary. Part of the sugars have been delivered. The inconvenience to the mercantile world would be very great, if every indorsement were required to be shewn to the *Dock-Company*.—Nothing in this case varies from principles or facts.—Before the *Docks* were opened, sugars were deposited at quays. The warrant is the lock and key to the property, therefore by the transfer and indorsement, the reputed or apparent ownership is gone. The property could not be removed without the production of the warrants. The cases cited are distinguishable from the present, as, in those cases, the persons setting up a right have been in actual possession. With respect to the lease, the defendants, as bankers, have unquestionably no lien on it: it was left with them by mistake, and not deposited as a security.

Mr. Justice BURROUGH.—There can be no question as to the lease. The plaintiffs are clearly entitled to it. It is also perfectly clear that the molasses passed to

the defendants by the indorsement of the *Dock-warrants*. The statute of *James* enacts, that "the commissioners shall be empowered to sell the goods of the bankrupt, with the consent and permission of the owner and proprietor." Can it be contended, that the defendants consented that these sugars should be in possession of the bankrupt, contrary to usage and practice? The possession of the warrant carries with it the possession of the property.—There was no power of alteration or sale of the property in the bankrupt. The only mode of procuring delivery was for the holder of the *Dock-ticket* to present it at the warehouse, when the goods would be delivered accordingly.

Judgment for the defendants as to the molasses, and the verdict to stand for the plaintiffs, for the value of the lease.

1817.  
LUGAS  
v.  
DORRIEN

KING, and another, assignees of MAINE, a bankrupt, v.  
BRIDGES and another, sheriff of Middlesex.

Tuesday,  
Feb. 4th.

MR. Serjt. *Best*, on a former day in this term, had obtained a rule *nisi*, that all proceedings in this cause should be staid, until the defendants were indemnified to the satisfaction of one of the prothonotaries of this court.

Mr. Serjt. *Onslow* now shewed cause against the rule, and stated this to be an action brought against the defendants, as sheriff of *Middlesex*, to recover the value of certain goods taken by them in execution, under the following circumstances.—It appeared by an affidavit of the

to sell.—*Held*, that the sheriff, having applied to the plaintiff in the action for an indemnity for proceeding to sale, as well as to the assignees, for returning *nulla bona*, was, on refusal of such indemnity by both parties, justified in selling the goods, and the court will interfere to protect him.

Where a sheriff by virtue of a *fiery facias*, took in execution goods of a person who after the seizing, and before the sale of them, became bankrupt, and the assignees gave the sheriff due notice of the bankruptcy, and at the same time required him not



1817.  
 KING  
 v.  
 BRIDGES.

defendants' officer, that on the 4th of *December* last, a writ of *feri facias* was delivered to the defendants against the goods of *Maine*, returnable in the *King's Bench*, on the first day of this term, at the suit of one *Flower*, for £127, and that on the 6th of *December* the goods were accordingly seized.—On the 9th, notice was given to the defendants, that a docket had been struck against *Maine*, and required them not to sell under the execution.—The defendants, therefore, applied to *Flower's* attorney for an indemnity for proceeding to sale and paying the produce thereof, under the writ; as well as to the plaintiffs' attorney for being indemnified for returning *nulla bona*, both of which applications were refused. He produced an affidavit of the plaintiffs' attorney, which stated, that on the 10th, the effects were removed from the bankrupt's premises, for the purpose of sale, and that on the 11th the commission was opened, and *Maine* declared a bankrupt, of which the defendants had due notice, and were thereby required not to dispose of his effects, which however were sold on the 12th.—That no application had been made to him by the defendants, either before or since the removal of the goods, to indemnify them on their returning *nulla bona*, and that if the defendants had applied for such indemnity, previous to the sale, it would have been duly granted. That the defendants' officer, on the 23d of *January* last, (being the return of the writ in the present action) offered to pay the produce of the sale of the goods to the plaintiffs, subject to the deduction of the expences, which was refused on the ground of the action being brought for the value of such goods.

But the court said, that, under the circumstances, they would protect the sheriff, and therefore made the

Rule absolute.

WILSON, and others, v. HART.

Wednesday,  
Feb. 5th.

THIS was an action brought by the assignees of *Gauntlett Clarke*, a bankrupt, and *Gray* who was his partner previous to the bankruptcy, to recover the sum of £1000 12s., being the price of thirty bags of *Spanish-wool*, sold to the defendants, by one *Wilkins*, who acted as broker for *Clarke* and *Gray*, before the former became bankrupt. The declaration contained counts for goods sold and delivered before *Clarke's* bankruptcy, and the common money-counts.

Parol evidence of a broker may be admitted, to shew that a sale of goods was made to a third person, for whom the buyer acted as agent, although the bought note and invoice were made out in the name of the buyer.

The cause was tried before Lord Chief Justice *Gibbs*, at the sittings at *Guildhall*, after last *Trinity* term, when it appeared, that on the 8th of *July* 1813, *Wilkins* requested a person by the name of *Read*, with whom he had previously dealt, to purchase some wools; *Read* said that the defendant, who was a clothier, in *Wiltshire*, would become a purchaser, and would allow him (*Read*), one penny per lb. for buying. *Wilkins*, in consequence, told *Clarke* and *Gray* that *Read* would purchase the wools in question, which they then had to dispose of, and that he had agreed to pay for them by the defendant's acceptances. To this they assented, and *Wilkins*, in consequence, left samples of the wools with *Read*, which the defendant inspected, and approved of.—The defendant requested time for payment, by being given credit for six months from the time of weighing, and then an acceptance at two months, to which the bankrupt and *Gray*, through the medium of *Wilkins*, acquiesced. *Wilkins* then sent the terms of the contract to *Read* in the following bought note.

1817.  
  
 WILSON  
 v.  
 HART.

Mr. Rd. Read.

I have bought of *G. Clarke*, for your account, thirty bags, *Spanish-wool*.

Tare and draft, 11 per cwt., to be paid for by *W. Hart and Co.*—Bills at two months date, from six months. Twenty-one days allowed to weigh one-half, and thirty-five days allowed to weigh the remainder.

July 10th 1813.

Jno. Wilkins.

*Wilkins* made an entry in his contract-book in similar terms.—The invoice, after the wools were weighed, expressed them to be purchased of *Clarke*, by *Read*. The defendant ordered them to be forwarded from *Clarke's* to a wharf, to be shipped on his account; some time afterwards, *Clarke* requested *Read* to accept bills for the amount of the wools for his accommodation, and for which he promised to provide; he accordingly drew two bills on *Read*, one for £500: 12s., dated 31st July 1813, the other for £500, dated 14th August 1813. Both of these bills were payable at six months after date, in order that they might fall due on the same days as those of the defendant, according to the terms of the contract. These acceptances of *Read* were to be provided for by the defendant's bills on *Clarke*.—In January 1814, *Read* became insolvent, and assigned his estate to trustees for the benefit of his creditors. The bills were dishonoured when the plaintiffs demanded payment of the defendant, which being refused, the present action was brought.—On the examination of *Wilkins*, (the plaintiffs' broker), he swore that this was a sale to the defendant, for whom *Read* acted merely as an agent. On the other hand, *Read* swore that he purchased on his own account, and that he was neither authorised to buy for the defendant, nor to pledge his credit. On this conflicting evidence,

his lordship left it to the jury to determine, whether this was in fact a sale to the defendant, or to *Read*.—They found that it was a sale to the defendant, and the plaintiff had a verdict accordingly.

Mr. Serjt. *Best*, in the course of the last term, obtained a rule *nisi*, that the verdict should be set aside and a new trial granted, on the grounds of the inadmissibility of *Wilkins's* evidence, in contradiction to the terms of the contract between the parties.

Mr. Serjt. *Lens* and Mr. Serjt. *Copley* now shewed cause, and insisted that although the transaction appeared from the written documents to be a sale from *Clarke* to *Read*, it was in reality a sale to the defendant, for whom *Read* acted in the capacity of broker. The testimony of *Wilkins* confirmed this, and the transaction was known to all the parties. The acceptances given by *Read* were merely for the accommodation of *Clarke*, and were not intended for the payment of the wools, or to be placed to the credit of the defendant. They contended that *Wilkins's* evidence was admissible, for the purpose of shewing that *Read* acted as the broker of the defendant; that such testimony would not, in effect, vary the terms of the contract, but merely tend to shew, that the wools were purchased by him for the defendant, who consequently received them.—They distinguished this from the cases of *Gunnis v. Erhart* (a), and *Powell v. Edmunds* (b), where the declarations of an auctioneer, at the time of sale, were held inadmissible to contradict the printed conditions. The question here is, whether where one broker makes out a contract-note and invoice, in the name of another, whom he credits in his books;—he can give parol evidence that the contract was made with a third person, as principal, and not with the broker, whose name

1817.

WILSON  
v.  
HART.

---

(a) 1 H. B. 289.—(b) 12 E. R. 6.

1817.  
 WILSON  
 v.  
 HART.

only appears on the face of the instrument.—In the case of *Addison v. Gandassequi* (a), the question was, whether the credit was given to the broker, or to the principal.—Here the jury have decided that it was given to the defendant, as principal, and that *Read* acted in the capacity of broker. *Paterson v. Gandassequi* (b) differed materially from the case last cited, as the credit was not explained.—It has been proved by *Wilkins*, that the defendant inspected and approved of the wools; arranged as to the payment, superintended the weighing, and ordered them to be forwarded to him; this, therefore, was a contrivance between *Read* and the defendant, to whom the former was indebted. The jury have well weighed the conflicting evidence of both the witnesses, have given credit to *Wilkins*, and therefore their verdict ought not to be disturbed.

Mr. Serjt. *Best* and Mr. Serjt. *Vaughan* in support of the rule, urged, that, on the face of all the documents, this appeared to be a bargain between the plaintiffs and *Read*, and that unless it were clear that the conduct of the latter and the defendant was fraudulent, the parol evidence of *Wilkins* would be inadmissible. It has been strongly insisted on, for the plaintiffs, that *Read* acted as the broker of the defendant; this does not appear to be the case, for he purchases on his own account alone. He must, in this case, be considered as the principal.—*Wilkins* could not say he sold to *Hart*, having signed the contract as a sale to *Read*, and it was therefore repugnant to the general rule of law, that a contract in writing cannot be varied by parol testimony.—It appears by the bought note, that *Read* is the principal, and that *Hart's* bills are the security for the payment of the wools. This note is confirmed by the invoice, which states it to be a

---

(a) 4 Taunt. 574. — (b) 15 E. R. 62.

sale from the plaintiffs to *Read*. This, therefore, comes within the construction of the statute of frauds (a), for, it would be sufficient to shew that the invoice was made out in the name of the principal to make him liable under that statute. *Read* had previously purchased goods from *Wilkins* under similar terms, and the defendant therefore was only collaterally liable. The defendant was known from the beginning to the end of the transaction; he approved the goods, and directed them to be forwarded to him: How, therefore, came the contract-note to be made out in the name of *Read*? The case of *Addison v. Gandassequi* is expressly in favour of the defendant. The defendant here was never debited, for the contract was solely with *Read*. The facts in *Paterson v. Gandassequi* were nearly similar, as the defendants there had a verdict, because it was known on whose account the goods were bought. The wools were bought and paid for by *Read*'s bills; he had no authority to pledge the defendant's bills, although it was intended that the goods should be paid for by them. Suppose the plaintiffs had brought their action against *Read*, could it be possibly contended that he would not be liable for the payment of the wools? If, therefore, he would be liable, the defendant cannot be, for there would then be two principals. *Read* has sworn that he purchased on his own account: The bought note and invoice are in direct confirmation of this testimony. It was left to the jury to decide on the contradictory evidence of *Read* and *Wilkins*, and as *Read* swore that he was the principal, and resold to the defendant, the latter cannot be liable.

1817.  
 WILSON  
 v.  
 HART.

---

(a) 29 Car. 2. c. 3. s. 17.—By which it is enacted, that 'No contract for the sale of any goods, wares and merchandises, for the price of ten pounds or upwards, shall be good, except the buyer shall accept part of the goods so sold and actually receive the same; or give something in earnest to bind the bargain, or in part of payment; or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract or their agents thereunto lawfully authorized.'

1817.  
WILSON  
v.  
HART.

Mr. Justice DALLAS.—We are not called upon in this action to determine whether the jury were right or wrong in their decision, but whether they gave their verdict so clearly against evidence, as to authorize us to grant a new trial. The question left to them was, whether this was not a contrivance between *Read* and the defendant, in order to induce the plaintiffs to consider the latter responsible. This being a case of contradictory evidence, the jury judged of the credit due to each of the witnesses, and having duly considered the nature of the written documents, decided in favour of the veracity of *Wilkins*.—The only question was, whether *Read* acted in the capacity of agent: That circumstance did not depend on the testimony of *Wilkins* alone. It has been decided in the case of *Kemble v. Atkins* (a), that a broker may make a contract in his own name, without inserting that of his principal.—The circumstances, as to the purchase and disposition of the goods, were in that case somewhat similar to the present.—The jury have deemed this to be a contract made by *Read*, as the agent of the defendant, and, therefore, are not wrong in the conclusion they have drawn.

Mr. Justice PARK.—I am of the same opinion.—This application appears to be made on two grounds: *First*, that parol declarations cannot be received to explain a written contract; and, *secondly*, whether there is sufficient evidence of fraud between *Read* and the defendant for the jury to give a verdict for the plaintiff. The decision of my brother *Dallas* will neither infringe on the statute of frauds, nor affect those cases which have been previously determined. It is clear that parol evidence, to vary a written contract, cannot be received: but that the parties contracted in the capacities of principals or agents, may be explained. Putting the documents out of the case, and

---

(a) *Ante*, p. 6.

presuming on the contradictory testimony of the two witnesses that there was a fraud between *Read* and the defendant, the verdict of the jury is satisfactory and conclusive.

Mr. Justice BURROUGH assented.

Rule discharged.

1817.

WILSON  
v.  
HART.

WHEELWRIGHT and another v. JUTTING, bail of *Fles*.

Thursday,  
Feb. 6th.

THIS was an action of debt, on a recognizance of bail entered into by the defendant in this court, under the following circumstances. *Fles*, the defendant in the original action, was indebted to the plaintiffs in £500, for goods sold and delivered; for the payment of which he had accepted three bills of exchange, drawn on him by the plaintiffs for £167 each, payable at five, seven, and nine months. The first of these bills being dishonoured, *Fles* was arrested by the plaintiffs on an affidavit, stating him to be indebted to them in £167 and upwards, upon and by virtue of a bill of exchange drawn by plaintiffs upon, and accepted by *Fles*, for £167. The defendant, with one *Simmons*, became his bail in this court, and entered into the usual recognizance, viz. £334, being double the amount of the sum sworn to:—The plaintiffs declared against *Fles*, upon the bill, and added counts for goods sold, and the common money counts, and laid their damages at £600.—Having obtained interlocutory judgment against *Fles*, a writ of inquiry was executed, when the plaintiffs obtained final judgment for £535 : 6s., being the whole sum due to them for the goods furnished to *Fles*. In last *Trinity* term

Where an affidavit to hold to bail is for £167, and upwards, on a bill of exchange only, and the plaintiff recovers a general verdict for a greater amount, as well on the bill as for goods sold, the bail are only liable for so much as is recovered on the bill of exchange; and it seems that the payment of such sum with costs by one of the bail is a discharge of the other.



1817.  
 WHEELWRIGHT  
 v.  
 JUTTING.

the plaintiffs brought an action in the *King's Bench* against *Simmons* on his recognizance, and in *Michaelmas* term following, a rule *nisi* was obtained that all proceedings should be staid upon the payment of *the sum sworn to in the action, with interest and the costs of both actions*, which rule was made absolute, and the terms of the rule afterwards complied with, by payment of the sum of £219. : 13s. : 3d. to the plaintiffs by *Simmons* and the defendant.—The present action was brought against the defendant on the recognizance entered into by him in this court.

Mr. Serjt. *Vaughan*, on a former day in this term, had obtained a rule *nisi* that the further proceedings in this case should be staid, on the ground that all claims which the plaintiffs had upon the defendant, by reason of the recognizance, had been satisfied in the action brought in the *King's Bench* against *Simmons*, the other bail.

Mr. Serjt. *Best* now shewed cause, and observed that there was a material difference between the practice of the court of *King's Bench* and that of the *Common Pleas*, as to the liability of bail on their recognizance, inasmuch as in the former, it was decided by a rule of court (a), that bail together are only answerable to the extent of the sum sworn to and the costs, whatever the amount recovered may be; but in this court each of the bail is considered separately responsible for the sum recovered to the full extent of the penalty of the recognizance, being double the amount of the sum sworn to. He insisted, that this sum had not been satisfied, that the original action having been brought, and the recognizance entered into in this court, the plaintiffs were entitled to recover in this action against the present defendant to the extent of his recognizance. He stated that the now defendant,

---

(a) *Easter, 5 Geo. 2.*

not being in the kingdom at the time, could not be sued in the first instance with *Simmons*, and that the latter was sued on his recognizance in the *King's Bench*, because the return days of this court had expired.

1817.  
WHEELWRIGHT  
v.  
JUTTING.

Mr. Serjt. *Vaughan*, in support of the rule, assented to the difference of the practice in the court of *King's Bench*, as to the amount for which bail were liable on their recognizance, but insisted that the present action was not maintainable, as the plaintiff had obtained a judgment against *Fles*, upon a cause of action not disclosed by their affidavit of debt, and that this case was therefore expressly within that of *Caswell v. Coare* (a), where, although a general verdict was taken, the court discharged the bail, because the verdict was founded on evidence inapplicable to the counts to which the affidavit applied; and that as in this case the affidavit was confined to the bill of exchange for £167, and the sum recovered against *Fles* being £535: 6s., as well on the bill of exchange as for goods sold, that the plaintiffs had been paid, by the action against *Simmons*, the full amount of the cause of action sworn to against the principal, together with all costs, and that the defendant was thereby discharged from his recognizance.

The court, without noticing the effect of the proceedings against *Simmons* in the court of *King's Bench*, held that this case came within the doctrine laid down in that of *Caswell v. Coare*, and that as the plaintiff's affidavit was confined to the bill of exchange, they could only recover to the amount of such bill.

Rule absolute.

---

(a) 2 Taunt. 107.

1817.

Thursday,  
Feb. 6th.

MORRIS v. HURRY.

The court will not allow the venue to be changed in an action on a charter-party of affreightment on the usual affidavit.

MR. Serjt. *Vaughan* on a former day had obtained a rule *nisi*, on the usual affidavit, to change the venue in this action, which was brought on a charter-party of affreightment, from *London* to *Lancaster*.

Mr. *Solicitor-General* now shewed cause, and insisted that in order to change the venue, it was necessary to shew that the cause of action was confined *wholly* to the county to which such venue was intended to be changed.—Here, as it appeared on the face of the declaration, that the charter-party was by deed, the defendant could not swear that the cause of action arose at *Lancaster*.

Mr. Serjeant *Vaughan*, in support of the rule, was stopped by the court, who determined that they would not allow it, unless some special ground were laid, and the rule was consequently

Discharged (a).

---

(a) See *Evans v. Weaver*, 1 B. & P. 20.—*Whitburn v. Staines*, 2 B. & P. 355.

Thursday,  
Feb. 6th.

PARTRIDGE v. HERBERT and FRASER.

If a joint warrant of attorney be entered into by two persons, with an unconditional defeasance, and the plaintiff by letter, stipulating that the money should be payable by instalments, pledged himself not to proceed against the parties, unless he apprehended failure:—*Held*, that, if he was apprehensive of the failure of one, he might enter up judgment against the other, before the first instalment became payable.

MR. Serjt. *Copley* moved for a rule *nisi*, to set aside the judgment entered up on a warrant of attorney against the defendant *Fraser*, and the execution issued and executed thereon against his goods, and that the same might be

restored to him.—The defeasance purported to be merely for avoiding the judgment, upon the payment of £740, and interest, by both the defendants, on the 31st of *December* 1816. By an affidavit of *Fraser*, it appeared that he executed the warrant of attorney as a surety for *Herbert*; that the real terms of the defeasance were contained in a letter from the plaintiff's attorney, dated the 28th of *Dec.*, in which it was stipulated that the money should be payable by instalments, and that the first payment was not to be made till the 15th of *February*, 1817.—That notwithstanding this letter, execution was levied against his goods on the first of *February* for £745, and costs.—He insisted that this was a non-compliance with the rule of *Mich. 42 Geo. 3. (a)*, which requires the substance and effect of a defeasance to be written on the warrant of attorney.—He cited *Morell v. Dubost (b)*, *Shaw v. Evans (c)*.

1817.  
PARTRIDGE  
v.  
HERBERT.

But it appearing to the court, on reference to the letter containing these terms, that although the defeasance on the warrant of attorney was unconditional, the plaintiff had pledged himself not to proceed with hostility against the defendants, unless he should apprehend danger by failure or otherwise in the parties.—*Held*, that this being a joint warrant of attorney, and the plaintiff entitled to execution against both the defendants, he might proceed against the defendant *Fraser* if he apprehended the failure of *Herbert*.

Rule refused.

---

(a) *K. B. & E. R.* 136. *C. P. 3 B. & P.* 310.—(b) 3 *Taunt.* 235.—(c) 14 *E. R.* 576.

1817.

Friday,  
Feb. 7th.

LEVY v. Lord HERBERT.

In an action of *assumpsit* for not delivering bonds and other securities, pursuant to an agreement, where the consideration money was to be paid on the receipt of the securities; it is not necessary to aver an actual tender of the money, an allegation of the plaintiff's being ready and willing to pay is sufficient.

THIS was an action of *assumpsit* brought on an agreement entered into between the plaintiff and defendant, bearing date the 17th day of *August*, 1816, by which the defendant, in consideration of the ten several sums of £500, to be paid to him by the plaintiff, agreed that he would at his own proper costs and charges, make, seal, execute, and deliver to the plaintiff, on or before the 18th day of *September* then next, ten several bonds in writing, respectively binding himself and his heirs, each in the penalty of £4000, and each to be conditioned to be void either in the event of the defendant departing this life in the lifetime of his father, the Earl of *Pembroke*, or in the event of the defendant surviving his father, paying to the plaintiff within three calendar months next after the decease of the Earl of *Pembroke*, the principal sum of £2000, with interest on such principal sum from the time of the decease of the Earl of *Pembroke*; and that he would, at his own costs, make, execute, and deliver unto the plaintiff, on or before the 18th day of *September*, ten several warrants of attorney, authorizing certain attornies therein named to suffer judgment to be entered up against the defendant upon the bonds; and that the bonds and warrants of attorney should be in such form, and contain such clauses or agreements, for the purpose of effectuating the intention of that agreement, as the *plaintiff's counsel should advise or require*; and the plaintiff agreed with the defendant, that the plaintiff would, on or before the 18th day of *September*, on receiving the bonds and warrants of attorney duly executed as aforesaid, well and truly pay

unto the defendant the ten several principal sums of £500; and that in case the plaintiff should not, on or before the 18th day of *September* then next, find it convenient to pay to the defendant the ten several sums of £500, then the ten several bonds and ten several warrants of attorney respectively conditioned as aforesaid, and signed and sealed by the defendant, should, on the 18th day of *September*, be delivered by the defendant, at his own costs and charges, unto *T. Wright*, of *Henrietta-street, Covent-Garden*, as escrows, to be by him held and retained as such, until the plaintiff should pay unto the defendant the ten several sums of £500, and upon payment of such sums to be respectively delivered unto the plaintiff for his own use, with a proviso, that in case either the defendant or the Earl of *Pembroke* should depart this life on or before the 18th day of *September*, the agreement should be void.—The first count of the declaration, after setting out the agreement, and stating mutual promises, averred that the Earl of *Pembroke* was still living, and that although the plaintiff was on the 18th of *September* next ensuing the date of the agreement ready to pay to the defendant, on receiving the bonds and warrants of attorney, duly executed, for the ten several principal sums of £500, whereof the defendant had notice; and that although the plaintiff was ready and willing to perform the agreement on his part, assigned for breach that the defendant did not at his own proper costs and charges, make, seal, and deliver to the plaintiff, either on the 18th of *September*, or since, the said ten bonds, or the said ten warrants of attorney, but refused so to do, contrary to the articles of agreement; and that the defendant, on the 5th of *October*, wholly discharged the plaintiff from any further performance of the agreement on his part. The second count was similar to the first, except that it averred, that although the plaintiff did not pay to the defendant

1817.

W

LEVY

v.

HERBERT.

1817.  
 ~~~~~  
 LEVY  
 v.  
 HERBERT.

the said ten several sums of £500 on the 18th of *September*, yet that the defendant did not on that day deliver the said ten several bonds and warrants of attorney so executed, as in the said agreement mentioned, unto *Thomas Wright* therein also mentioned, to be by him retained as escrows, according to the agreement; and that the plaintiff was on the 2d of *October* ready to pay to the defendant the said ten several sums of £500, and the damage alleged was the loss of the use of the bonds and warrants of attorney, and that the plaintiff had been put to the expense of £200, in preparing himself for the performance of the agreement on his part, and to enable him to complete the same with the defendant.—There was a third special count, on an implied contract, to pay the expenses of preparing the requisite instruments, the same having at the defendant's request been procured by the plaintiff, the agreement being, that the defendant should, at his own costs and charges, prepare the same. The common counts for work and labour, and the monies, were also added. To the three special counts the defendant demurred, and assigned for causes of demurrer, as to the first and second counts, that it was not sufficiently averred that any tender was made by the plaintiff to the defendant to pay him the said ten sums of £500, on receiving the bonds and warrants of attorney; and as to the third count, that the contract therein mentioned was not sufficiently set out, nor did it appear thereby of what nature the contract was, whether by deed or otherwise; and to the common counts, the defendant pleaded the general issue: The plaintiff joined in demurrer to the first and second counts, pleaded a *similiter* to the general issue, and entered a *nolle prosequi* as to the third count.

Mr. Serjt. *Blosset*, in support of the demurrer, stated, that the causes did not apply to the second count of the declaration, as it appeared that the plaintiff had not the

money to pay to the defendant on the 18th *September*, and that he should therefore have averred a request to the defendant to deliver the securities to *Wright* as escrows; and that as to the first count, it should have been stated therein, that the plaintiff had a right to demand those securities from the defendant; and that he was not only ready to pay the money, but offered to accept the securities, if the defendant had been ready to deliver them. He cited *Rawson v. Johnson (a)*.—He contended, that where there are mutual and concurrent acts, they must be construed according to the intention of the parties; and that under the general allegation of a party's being ready and willing, it was necessary to prove that an offer or tender was duly made to perform his own part. The nature of this contract was for the defendant to give a security for money to be advanced by the plaintiff, and it was intended that both those acts should be mutual, and done at the same time. It could not have been intended that the plaintiff should be put in possession of those valuable securities until the money was paid; and that such was the intention is clear from the next clause of the agreement, which provides for the circumstance of the plaintiff's not having the money to pay at the time; and as by the terms of the agreement it was stated that the bonds and warrants of attorney should be in such form as the plaintiff's counsel should advise, the defendant was not bound to execute those instruments, unless they were settled or drawn by such counsel. He cited 4 *Roll. Abr.* 462. 3. where it is laid down, that if a condition of an obligation be to account before such auditors as the obligee should assign; if the obligee do assign, he must give notice of them to the obligor, or he is not bound to

1817.  
 {  
 LEVY  
 v.  
 HERBERT.

---

(a) 1 E. R. 202.



1817.  
 ~~~~~  
 LEVY  
 v.  
 HERBERT.

account : So if a person be bound to enfeoff such persons as the obligee shall name, he should give notice whom he will name, else he is not bound to enfeoff them.—So to seal such an obligation as the obligee shall write, he is not bound to seal without notice of the obligation written; so if *A.* covenant with *B.* to make such an assurance of a manor as *B.*'s counsel shall devise before such a day, and he devises one, *B.* should give notice to *A.*, or he is not bound to perform it.

Mr. Serjt. *Best* was about to support the declaration.—But *per Curiam*. The defendant agreed to deliver the securities on the 18th of *September*, when the plaintiff was willing to accept them.—In *Rowson v. Johnson*, there is no refusal and discharge. In this case, both those facts are alleged in the declaration.—In *Wilks v. Atkinson*. (a), it was laid down by Lord Chief Justice *Gibbs* to be unnecessary for the plaintiff to prove an offer of money in an action for not delivering goods according to agreement, till the defendant was ready to perform his part of the contract by the delivery of such goods. In *Morton v. Lamb* (b), Lord *Kenyon* held, that where two concurrent acts are to be done, it is sufficient for the party who sues the other for non-performance to aver that he was ready to perform his part of the contract; and as the plaintiff has averred that he was ready to pay the money on receiving the bonds, it is sufficient. Had the agreement stipulated that the securities were to be drawn in such form as the defendant's counsel should advise, there might have been a ground of doubt on the last objection taken; but how could the plaintiff's counsel advise on instruments the defendant had never produced? Although this is an immoral contract of the defendant to pay

---

(a) 1 *Marsk.* 412.—(b) 1 *T. R.* 139.

money after the death of his father, the court cannot assist him; and, therefore, there must be

Judgment for the Plaintiff (a).

1817.  
 LEVY  
 v.  
 HERBERT.

The court allowed the demurrer to be withdrawn, on the defendant's pleading issuably, and going to trial at the sittings after this term.

(a) See *Waterhouse v. Skinner*, 2 B. & P. 447. *Smith v. Woodhouse*, (in error), 2 N. R. 233.

HICKLING and another v. HARDEY.

Friday,  
 Feb. 7th.

THIS was an action on a bill of exchange, dated the 21st day of *February*, 1816, drawn by the defendant at *Saint Michaels*, on *Brown*, in *London*, for £400, payable to the plaintiff's order, at ninety days sight, value received in fruit. The first count of the declaration, after stating the terms of the bill, alleged that on the 19th of *March*, 1816, the bill was presented to *Brown* for acceptance, which he refused, when it was duly protested for non-acceptance, of which the defendant had notice, and thereby became liable to pay the said sum of £400 to the plaintiffs on request.—To this count were added two others, for goods sold and delivered, and the common money counts. The defendant pleaded the general issue.—The cause was tried before Lord Chief Justice *Gibbs*, at *Guildhall*, at the sittings after last *Michaelmas* term, when his lordship directed a verdict to be found for the plaintiffs, with leave for the defendant to move to set it aside and enter a nonsuit, on the following grounds.—

Where a bill of exchange is given in payment for goods sold, which, upon presentment to the drawee, is refused acceptance:—*Held*, that the holder having declared against the drawer on the bill, and joined counts for goods sold, may treat such bill as a nullity, and recover his demand on the latter counts, although the credit on the bill be not expired. It is sufficient in such an action to prove a presentment to the drawee for acceptance, without shewing that the bill was protested for non-acceptance, or that the drawer had notice of its dishonour.

1817.  
HICKLING  
v.  
HARDEY.

The bill was given in payment for oranges sold to the defendant by the plaintiffs, at the island of *Saint Michael*; the plaintiffs abandoned the count on the bill, and resorted to those for goods sold and delivered, on which the defendant was held to bail. It was proved on behalf of the plaintiffs, in order to support the latter counts, that the defendant had admitted the receipt of the oranges, that the plaintiff's demand was correct, and that they had received the bill in payment, that on the bill's being refused acceptance by *Brown* on the 19th of *March*, this action was brought on the 27th of that month, though the bill would not become due till the 20th of *June*. The defendant's counsel then submitted that the plaintiffs, having declared on the bill, should prove a due presentment for acceptance, *Brown's* refusal to accept, as well as the protest and notice of such non-acceptance to the defendant, as it was in evidence that the plaintiffs had taken the bill in payment for the oranges, and brought the present action for goods sold and delivered before the bill was due.

Mr. Serjt. *Best*, on a former day in this term, obtained a rule *nisi* to set aside the verdict, and enter a non-suit accordingly.

Mr. Serjt. *Copley* now shewed cause against the rule, and insisted that the plaintiffs might resort to the count for goods sold and delivered, as they proved the delivery and value of the oranges at the trial.—The bill of exchange given by the defendant did not amount to payment, as the plaintiffs were prepared to prove that it had been presented to *Brown*, who had refused to accept it, stating, as a reason, that he had received no advice from the defendant, nor had he any effects of his in his hands at the time. The defendant, after the action was brought, admitted the refusal, and told the plaintiffs that if they would present it a second time, it would be accepted. It was therefore sufficient to prove *Brown's* refusal, with-

out shewing that the defendant had notice of such refusal. He cited the case of *Bishop v. Rowe* (a).

Mr. Serjt. *Best*, in support of the rule, contended that the case of *Bishop v. Rowe* was wholly inapplicable to the present; that the taking of the bill in the first instance must be esteemed a full payment of the debt; and that as the plaintiffs had not complied with the requisites of the stat. 3 & 4 Ann. c. 9. s. 7. (b), they were not entitled to recover, on the count for goods sold.—The statute of *Anne* applies to inland bills, in order to put them on a level with foreign, which latter are considered as absolute payment, if due diligence be not used. The plaintiffs, therefore, should have protested the bill on *Brown's* refusal to accept. In the case of *Stedman v. Gooch* (c), which was an action for goods sold and delivered, the plaintiff had taken three promissory notes in payment, and Lord *Kenyon* had there held, that if a person in payment of a debt gives a bill or note payable at a future day, the party receiving it cannot sue on his original debt, until the time which such bill or note has to run is expired. *Brown* doubted whether the oranges would be approved or not: He stated that when that fact should be ascertained, he would accept the bill.

Mr. Justice DALLAS. The holder is not obliged to present it for acceptance a second time. In the case of *Hebden v. Hartsink* (d), Lord *Kenyon* has laid it down that where goods are paid for by a bill, it is unnecessary for the person giving such bill to prove that it has been paid,

1817.

HICKLING  
v.  
HARDEY.

(a) 3 M. & S. 362.

(b) By which it is enacted, "that if any person accept any bill of exchange for and in satisfaction of any former debt, or sum of money formerly due unto him, the same shall be accounted and esteemed a full and complete payment of such debt, if such person, accepting of any such bill for his debt, doth not take his due course to obtain payment thereof, by endeavouring to get the same accepted and paid, and make his protest either for non-acceptance or non-payment thereof."

(c) 1 Esp. 3.—(d) 4 Esp. 46.

1817.  
 ~~~~~  
 HICKLING  
 v.  
 HANDRY.

and that the party taking the bill in payment of such debt was a presumption that the money was received, unless the contrary were shewn. Here the defendant has admitted that the bill was duly presented to *Brown* for acceptance, which he refused; and Lord *Ellenborough* has held in the case of *Mussen v. Price* (a), where all the authorities on this subject are referred to, that where a person takes in payment for goods a bill drawn by the vendee on another, payable at a future time, if the bill be dishonoured, the payee may bring his action immediately. The defendant, therefore, having undertaken in the first instance that the bill should be honoured by *Brown*, and admitted that it was not accepted by him when it was presented, I think it supersedes the necessity of protest, and there is no reason to adduce further evidence than that offered at the trial; the plaintiff may therefore treat the bill as a nullity, and resort to his original demand.

Mr. Justice PARK.—The defendant has admitted that the bill was not accepted; he has therefore failed in his engagement, and the plaintiffs are entitled to recover in this action for the value of the goods, although the credit on the bill was not expired at its commencement.—Lord *Kenyon* ruled in *Siedman v. Gooch*, that although it was clear, that if in payment of a debt, a creditor contracts to take a bill payable at a future day, still, that if such bill were of no value, he might treat it as waste paper, and resort to his original action.

Mr. Justice BURROUGH concurred.

Rule discharged (b).—

---

(a) 4 E. R. 147.—(b) See *Milford v. Mayor*, 1 Doug. 55.—*Rollingmill v. Glover*, 4 Esp. 202.

1817.

BROWN v. MILLNER, and another.

Saturday,  
Feb. 8th.

THIS was an action of *indebitatus assumpsit*, brought by the plaintiff, as master of a ship called the *William and Mary*, for wages due to him from the defendants, as part owners, at the rate of £10 10s. per month, from the 30th of November, 1800, to the 28th of May, 1801, being the time the ship was under an embargo, at the port of *Riga in Russia*.

The cause was tried before Mr. Justice Park, at *Guildhall*, at the first sittings in this term, when the plaintiff had a verdict for £62 : 6s., being the amount of the wages during such detention. It was proved on the part of the plaintiff, that the defendants were part owners; and, in order to take the case out of the statute of limitations, two letters from them to the plaintiff were read, dated in the years 1814 and 1816; containing promises of payment. It was also proved, that £10 : 10s. per month were fair wages.

Mr. Serjt. *Hullock*, on a former day in this term, obtained a rule *nisi*, that the verdict should be set aside and a nonsuit entered, on the ground that it was not proved by the plaintiff at the trial, that the ship had earned freight.

Mr. Serjt. *Best* now shewed cause, and insisted that the evidence was sufficient to warrant the jury in finding a verdict for the plaintiff, and that it was unnecessary for him in an action brought for the recovery of wages to prove that freight had been earned. Though freight is, by the maritime law, deemed the mother of wages, still, it does not follow that where no freight is earned, there

In an action of *assumpsit* brought by the master of a vessel against his owners to recover wages which accrued during his detention in a foreign port, it is not incumbent on him to prove that freight was earned.—It is sufficient for him to shew that he has performed his services, and the defendants must adduce evidence to prove that he is not entitled to remuneration.

1817.  
 BROWN  
 v.  
 MILLNER.

can be no wages. If, by any disaster happening in the course of the voyage, such as the loss or capture of the ship, the owners lose their freight, although the seamen are deprived of their wages, still, *prima facie*, they will be entitled to a remuneration for their services; and therefore, it was incumbent upon the defendants to have proved, that from some accident the ship earned no freight. The plaintiff having proved the performance of services on board the ship for which he claimed to be entitled to wages, it was incumbent on the defendants to shew the reason why he was not so entitled.

Mr. Serjt. *Hullock*, in support of the rule, contended that the defendants were not bound to negative a constituent part of the plaintiff's right, on which he sought to recover; neither could they be called on to sustain the plaintiff's case: it was therefore necessary for the plaintiff to have proved, either that he was entitled to his wages under a specific contract, or that freight had been earned; and that there was no case where it has been decided that a seaman is entitled to wages without freight being earned in the specific voyage, for which such wages are claimed: for a mariner's title to wages depends on the ship earning her freight for the voyage and the performance of his stipulated duty. He cited *Beale v. Thompson* (a). The question is, whether or not the person who sues for the recovery of such wages must prove that freight was earned, and as this is an action of *indebitatus assumpsit*, in order to establish the allegation that the defendants are indebted for such wages, it is not only necessary for the plaintiff to prove the services performed, but also the fund from which such wages are to come, and that the vessel earned freight: It was also incumbent on the plaintiff to have proved that he returned in the ship. In *Pratt v. Caff* (b),

---

(a) 4 E. R. 546. — (b) 4 E. R. 43, n.

which came on before the court on a special case reserved, under circumstances somewhat similar to the present, it was proved that the ship procured a cargo, and on the case coming on for argument, Mr. Justice *Lawrence* suggested that it should have been proved whether the defendant had received freight or not. It is therefore a question of law, and not of fact, whether it is not incumbent on the plaintiff, in cases of this nature, to prove that freight was duly earned.

Mr. Justice DALLAS.—This being a *prima facie* case, it was incumbent on the defendants to prove that the vessel earned no freight. If a seaman prove that he has performed services on board a vessel for which he claims to be entitled to wages, it lies on the owners of such vessel to shew why he is not entitled to receive them. It must be inferred that a vessel earned freight, and the arrival of a ship is presumptive evidence of her having so done. The plaintiff has declared on the general *indebitatus* counts for wages due to him as master of the ship. It is therefore sufficient for him to prove the averment of having earned such wages, and if his claim be disputed by the defendants it is necessary for them to shew why he was not entitled to them.

Mr. Justice PARK, and Mr. Justice BURROUGH, concurred.

Rule discharged.

1817.  
BROWN  
v.  
MILLNER.



1817.

Saturday,  
Feb. 8th.

AUSTEN, Esquire, sheriff of Surrey, v. HOWARD.

If a sheriff take a replevin bond from one surety only, and he be sued thereon by the person making cognizance for having taken insufficient pledges, who recovers damages and costs in such action—*Held*, that the sheriff having sued the surety on the bond for not having returned the goods, and suggested breaches according to the statute of 8 & 9 *Wm.* 3. c. 11 is not entitled to recover the costs incurred in defending the action against him as such sheriff, and that as the surety is deprived of calling on his co-surety for contribution, he is only liable to a moiety of the damages awarded by the jury in the action against the sheriff.

THIS was an action on a replevin-bond, dated the 14th Aug. 1810, which had been entered into by *Stretch Cowley Bromley*, the plaintiff, in replevin, and by the defendant, and *Hyde Brown* as his sureties. The defendant, after craving oyer of the bond and condition, pleaded that one *Stanton* had distrained the goods for rent due from *Bromley*, and that the plaintiff then being sheriff of *Surrey*, caused deliverance of the goods to be made to *Bromley* on the usual plaint, on which occasion *Bromley* and the defendant, as his surety, executed the bond to the sheriff, but that the same was *executed* by the defendant and *Bromley* only, and not by *Brown*, nor by any other person. To this plea the plaintiff demurred, the defendant joined in demurrer, and after argument (a), judgment was given for the plaintiff generally, who pursuant to the statute (b), assigned the following breaches: *First*, that the original action was removed into this court, at the instance of *Stanton*, and that judgment was given that the goods should be returned to him. That *Stanton* thereupon sued out his writ, *de retorno habendo*, to which the sheriff returned that the goods were *eloigned*, and removed by *Bromley* to places unknown; and that he could not therefore return them, of which *Bromley* had notice, and was requested to return the same, which he neglected to do; in consequence of which *Stanton* impleaded the plaintiff in this court, and recovered against him £405 : 11s. for damages which he had sustained by reason of the premises, which sum

---

(a) See 2 *Marsh.* 352.—(b) 8 & 9 *Wm.* 3. c. 11. s. 8.

the plaintiff was obliged to pay, together with £200, in and about his necessary expences, to the plaintiff's damage of £1000. There were two other suggestions, that the goods were *eloigned* by *Bromley*, who refused to return them; and in the second it was stated that the plaintiff paid *Stanton* £500, together with £200, for expences; and in the third, that he had paid £600, and incurred costs to the amount of £500. The truth of the breaches above suggested was tried before Lord Chief Justice *Gibbs* at the sittings after last *Michaelmas* term, when the jury assessed the plaintiff's damages at £439 : 1s. : 11d., subject to the opinion of this court, on a case of which the following is the substance :

*Bromley* being tenant to the bailiffs and freemen of *Kingston*, of certain lands in respect of which £211 : 10s. were in arrear to them for rent;—they, by *Stanton*, their bailiff, distrained the growing crops on the lands, whereupon *Bromley* levied his plaint upon the plaintiff, (then being sheriff of *Surrey*), who took from him and the defendant a bond for £500, (being double the value of the goods distrained). The suit in the sheriff's court was removed into this court by a writ of *re. fa. la.* and judgment was given in that suit against *Bromley*, and that the corn, &c. (of which the growing crops consisted) should be returned to *Stanton*, together with £72 : 15s. costs, who thereupon sued out a writ of *de retorno habendo*, to which the then sheriff returned that the goods had been *eloigned* by *Bromley*, who was called upon to return the same, which he refused, when *Stanton* brought his action in this court against the present plaintiff: These facts were set out in the declaration, which concluded by stating that the present plaintiff, not regarding the statute, &c., nor his duty as sheriff, but intending to deprive *Stanton* of his distresses, and all benefit thereof, did not, before the *replevying* the corn, take in the name of him, plaintiff, from *Bromley*, and two responsible persons, as

1817.

AUSTEN  
v.  
HOWARD.

1817.  
  
 AUSTEN  
 v.  
 HOWARD.

sureties, a bond in double the value of the corn distrained; but on the contrary thereof, that the corn had not been returned, either to *Stanton*, or the freemen of *Kingston*; nor had the rents so due from *Bromley*, to the freemen, and for which the distresses were made, been paid; nor had the judgment, nor any part thereof, been discharged or satisfied; nor had *Bromley*, nor *Howard* and *Brown* as his sureties, nor the defendant, so being sheriff as aforesaid, nor any of them, paid to *Stanton* as bailiff, or to the freemen, the value of the corn distrained, nor any part thereof. By means whereof, the plaintiff was deprived of the corn so distrained, and of the benefit and advantage of the distresses.—There were two other counts, imputing a breach of duty to the sheriff in not having taken a bond according to the statute, and in having taken insufficient pledges.—Issue was joined on those counts, and the cause against the present plaintiff, as sheriff, was tried before Lord Chief Justice *Mansfield*, when the jury found a verdict for the plaintiff for £284 : 10s : 0d. damages; and the plaintiff, *Stanton*, further recovered by the judgment of the court £121 : 1s : 0d. costs, and the amount of these several sums were in fact paid by the present plaintiff, to *Stanton*. The several sums of £110 : 5s : 0d., and £101 : 10s : 0d. (for which the distress was originally made) and the sum of £72 : 15s : 0d. amount to £284 : 10s : 0d. the sum for which the jury gave their verdict.

The plaintiff in defending that action was put to the further expence of £23 : 10s : 0d., which sum together with £405 : 11s : 0d. amount to £439 : 1s : 11d., which latter sum the plaintiff now sought to recover. The defendant contended that inasmuch as the sheriff became liable for these several sums in consequence of his own breach of duty, he had no claim against him. The plaintiff, on the other hand, insisted that though the action was in form against the sheriff for a breach of duty, yet, that

*Stanton* was damnified only by the goods not being returned pursuant to the condition of the bond.

The question for the opinion of the court was, whether the plaintiff were entitled to recover any thing more than nominal damages; and, if so, whether he could recover the whole of the sum of £439 : 1s. : 11d., or what part thereof.

Mr. Serjt. *Lees* stated that the point to be determined was, whether the plaintiff be not entitled to recover the whole of the damages which he had sustained in consequence of the goods not having been returned. If the goods had been returned pursuant to the condition of the bond entered into by the defendant, no claim for damages would have existed, and no action could have been maintained by *Stanton* against the plaintiff as sheriff; because, although he would have been guilty of a breach of duty as such sheriff, in having taken only one surety, still it would be *injuria absque damno*, a mere wrongful act, occasioning no injury to either of the parties. If the plaintiff were not entitled to the whole of the sum sought to be recovered by this action, he was at all events entitled to recover £284 : 10s. as being the sum for which the jury gave their verdict for *Stanton*. If the sheriff had taken *Brown* as a co-surety with the defendant, in the replevin bond, they would have been answerable for the above sum; but *Brown* not having executed the bond, *Stanton* proceeded against the plaintiff as sheriff, for not having taken sufficient pledges. The question then is, whether the defendant be liable to the costs of the action against the sheriff. If the defendant had returned the goods, or satisfied the rent according to the condition of his bond, no further expence would have accrued to the sheriff. At all events, if *Brown* had executed the bond, the defendant could only have resorted to him as a co-surety, but the obligation of

1817.  
AUSTEN  
v.  
HOWARD.

1817.  
 }  
 AUSTEN  
 v.  
 HOWARD.

the defendant is not void, and he therefore is liable on his undertaking. [Mr. Justice *Burrough*.—*Stanton* had no other mode of obtaining payment, but through the medium of an action against the sheriff.] If the statute had made the bond void, he would have had no other remedy: but the present defendant is not in so good a situation; he ought to have objected to sign the bond alone, but should have required it to be kept as an escrow. The bond, therefore, is valid as to the defendant, but bad as against the sheriff. The only effect of this omission of the sheriff is, that the defendant will be deprived of the additional security of *Brown*, as a co-surety. Although there has evidently been negligence in all the parties, it does not reduce the claim of the plaintiff to nominal damages, for the obligation is legal, though the condition be violated, and the plaintiff is therefore entitled to the whole of the damages which he has actually sustained.

Mr. Serjt. *Best* insisted that the sums of £121: 1s., and £23: 10s., being the costs incurred by the plaintiff in the defence of the action brought against him by *Stanton* for having taken insufficient pledges, were entirely out of the question, and that at all events the plaintiff could only recover a moiety of £284: 10s. as, from his neglect in not having taken *Brown* as a co-surety, the defendant could not resort to him as a co-obligor for contribution. This was owing to the misconduct of the plaintiff, in not having taken two pledges; it was his duty, as sheriff, to have complied with the requisites of the statute 11 G. 2. c. 19. s. 23. (a): he should

---

(a) By which it is enacted, "That sheriffs, and other officers, having authority to grant replevins, may and shall, in every replevin of distress for rent, take, (before any deliverance of the distress) in their own names, from the plaintiff, and two responsible persons, as sureties, a bond in double the value of the goods distrained, and conditioned for prosecuting the suit with effect, and without delay, and for duly returning the distress in case a return shall be awarded."

not therefore have caused the goods to have been delivered, until he had caused a proper bond to have been executed and signed by the plaintiff and two responsible persons as sureties, whereas he has taken it in the name of one only. The defendant, therefore, is only answerable as co-surety; and, consequently, is only liable to the plaintiff for one moiety, as it was through his default that *Brown* was not joined in the bond.—With respect to the question of nominal damages, he insisted that this was a legal bond, under which the obligee is only entitled to damages:—If the sheriff had assigned the bond, instead of bringing the present action, the defendant would have had a good defence against such assignee, as the bond would not be properly executed, so as to bring it within the statute 11 *Geo. 2, c. 19*.—He observed, that the case of *Blackett v. Crisop* (a), where it was held that a bond, taken by a sheriff, for duly prosecuting the suit and making return was good, was decided on the statute *Westminster, 2, ch. 2, (b)*, and before the passing of the 11 *Geo. 2*.

- Mr. Justice DALLAS.—If I become surety with another person in a bond, I can call on that person for contribution (c). The defendant is not liable for the misconduct of the sheriff, he is deprived thereby of his right of calling on his co-surety, neither is he liable to the costs the sheriff has incurred for not having taken the bond properly.—Lord C. J. Gibbs considered that the bond was not avoided, if it were executed by one of the sureties only (d) and the question therefore is, what the sheriff is now entitled to recover.—If the bond be good, nominal damages may be recovered. The justice of the case appears to be this: the sheriff ought to have taken a bond

1817.  
AUSTEN  
v.  
HOWARD.

---

(a) 1 *Lord Raym.* 278.—(b) 13 *Edw. 1*.—(c) See *Dunn v. Slee*, ante, p. 1.—(d) 2 *Marsh.* 363.

1817.  
 ~~~~~  
 AUSTEN  
 v.  
 HOWARD.

from two sureties.—If he had so done, the defendant would be liable as a co-surety only; the plaintiff, therefore, is entitled to recover the moiety of the damages from the defendant, which the jury awarded in the action brought against him as sheriff. The judgment, therefore, should stand for £142 : 5s.

Judgment, by consent, for the plaintiff accordingly.

Saturday,  
 Feb. 8th.

STEWART, and another, v. FRY and another.

Where persons have received money for the express purpose of taking up a bill of exchange, two days after it became due, and upon tendering it to the holders, and demanding the bill, find that they have sent it back protested for non-acceptance to the persons who indorsed it to them :—*Held*, that such persons having received fresh orders not to pay the bill, were not liable to an action by the holders for money had and received, when upon the bill's being reprocured and tendered to them they refused to pay the money.

THIS was an action for money had and received.—The plaintiffs were the holders of a bill of exchange for £200, dated the 27th of *January*, 1816, and drawn by one *Matthew Codd*, upon *Thomas Richards and Co.*, of *Liverpool*, payable to his own order at sixty-one days after sight, and accepted by them, payable at the banking-house of the defendants. The bill was indorsed by the drawer, to *Balfour and Co.*, and by them to the plaintiffs: It became due on the 7th of *April*, but that day falling on a *Sunday*, it was presented for payment on the 6th, and refused; it was presented a second time, on the 8th, and the defendants answered they had no effects; it was consequently protested and taken up by the plaintiffs.—On the 9th a letter was received by the defendants, from *Dublin*, dated the 5th, inclosing a specific remittance to take up the bill on the account of *Thomas Richards and Co.*, the acceptors, and requesting them to send to the plaintiffs to pay the bill. A clerk was accordingly sent to the plaintiffs to pay the money, but they had sent the bill back to *Ireland*. The defendants then wrote an ac-

count of what had occurred to Messrs. *Aspinall* and *Co.*, the bankers of the acceptors, at *Liverpool*, who communicated it to Messrs. *Richards* and *Co.* The latter consequently requested Messrs. *Aspinall* to direct the defendants not to pay the bill, but to place it to their credit, in account with *Aspinall* and *Co.*—This was accordingly done, and Messrs. *R.* and *Co.* received the £200, from Messrs. *Aspinall*. The plaintiffs having received the bill back from *Ireland*, requested payment from the defendants, but in consequence of the communication from *Aspinall* and *Co.*, they refused so to do, when the plaintiffs brought this action.

1817.  
  
 STEWART  
 v.  
 FRY.

The cause was tried before Lord Chief Justice *Gibbs*, at the sittings at *Guildhall*, after last *Michaelmas* term, when the jury gave a verdict for the defendants, as his lordship thought there was no undertaking on their part to retain the money, and that they could not resist the countermand which the acceptors had sent through the medium of *Aspinall* and *Co.*

Mr. Serjt. *Vaughan*, on a former day in this term, had obtained a rule *nisi*, that the verdict should be set aside, and a new trial granted, on the ground that the money having been remitted for the express purpose of taking up the bill, the defendants could not alter the original destination of the money, after the right of third persons had intervened:—He relied on the case of *De Bernales v. Fuller* (a). He contended, that the defendants should have waited till the bill had been returned to the plaintiffs, and that as they had parted with the money specifically appropriated to them without the consent of the plaintiffs, the latter were entitled to recover it back in this action.

---

(a) 14 E. R. 590.—But see *Williams v. Everett*, id. 582, *contra*.



1817.  
  
 STEWART  
 v.  
 FRY.

On this day Mr. Serjt. *Lens* was to have shewn cause, but the court, being unanimously of opinion that the defendants were under these circumstances entitled to a verdict,

Discharged the rule.

Monday,  
 Feb. 10th.

BENSON v. SCHNEIDER.

If the plaintiff subpoena witnesses, and remunerate them accordingly, who have been previously subpoenaed by, and received their expences from the defendant, which circumstances they conceal from the plaintiff: the court will allow the latter the expences he has paid those witnesses for their attendance, although they were not called for him at the trial, on the ground that such payment was obtained by fraud.

THE *Solicitor-General* moved that it might be referred to the prothonotary, to review his taxation of the plaintiff's costs, on the *postea*, so far as related to his allowance of the expences of two witnesses, who were subpoenaed from *Liverpool* to *London*, both by the plaintiff and defendant, under the following circumstances:—On the 3d of *December*, 1816, the defendant's attornies wrote to their agents at *Liverpool*, directing them to subpoena *Hurry* and *Cummins*, residents there, as witnesses on behalf of the defendant, and desiring them to be in *London* on the 13th of *December*. The defendant's agents subpoenaed them accordingly on the 6th, and paid *Hurry* £25, and *Cummins* £27 for their expences, and requested them to be in *London* on the 13th. On the 5th the plaintiff's attornies wrote to their agents at *Liverpool*, instructing them to subpoena *Hurry* and *Cummins*, as witnesses on behalf of the plaintiff, and desired them to be in *London* on the 11th; they were subpoenaed accordingly on the 7th and 8th, when *Cummins* was paid £10, for his expences, and although *Hurry* received nothing, yet the agents engaged that the plaintiff's attornies should pay

them both: they were directed to be in *London* on the 11th, according to the instructions of the plaintiff's attornies. The witnesses arrived on the 11th, and immediately applied to the plaintiff's attornies for their expences and loss of time, which each of them fixed at £25; they were paid accordingly. They both concealed from the plaintiff's attornies, that they had been subpoenaed on behalf of the defendant. They were both material witnesses for the plaintiff, but neither of them was called for him at the trial. They were also material and necessary witnesses for the defendant, and *Cummins* was examined on behalf of the latter. On the 11th, the defendant's attornies were informed that the witnesses had been subpoenaed on the behalf of the plaintiff, but too late to apprise the plaintiff's attornies that they had also been subpoenaed for the defendant. Neither party knew that the witnesses had been subpoenaed by the other; the respective payments were made by each party as a full compensation for their attendance.—Upon the taxation of the plaintiff's costs, the defendant's attornies objected to allow the expences of these witnesses, on the ground that the defendant had subpoenaed them before the plaintiff, and paid them sufficient for their whole expences, and as one of them had been examined for him, he could not recover it back; but it was contended that the plaintiff, who had not examined the witnesses, and who had been imposed upon, might recover back the money, as having been paid under a fraud. The prothonotary, under these circumstances, disallowed the expences of the witnesses to the plaintiff, as costs in the cause.

The *Solicitor-General* now stated, that the only question was, on whom the expences of these witnesses should fall.—He contended, that the plaintiff was compelled to pay the witnesses their expences immediately on their arrival in *London*, as their agents at *Liverpool* had engaged

1817.

BENSON  
v.  
SCHNEIDER.

1817.  
  
 BENSON  
 v.  
 SCHNEIDER.

that they should be paid by the plaintiff's attornies, in town; and that the defendant having also paid them, without the knowledge of the plaintiff, was still liable.

Mr. Serjt. *Lens* shewed cause, in the first instance, and opposed the taxation being reviewed.—He insisted, that the defendant had paid the expences of the witnesses, having first subpoenaed them.—That, although the plaintiff had subpoenaed them, he examined neither at the trial, and that one only had been called on for the defendant. The witnesses having been thus paid by the defendant, received the money from the plaintiff's attornies, by fraud. They were clearly brought up by the defendant, and, therefore, the plaintiff having afterwards paid them in his own wrong, might recover the sums paid them in an action for money had and received (a).

But, *per Curiam*.—Every witness, on being subpoenaed, has a right to demand his expences. The second payment was here obtained by fraud;—no blame, however, can be attributed to the plaintiff, as he believed them to be material witnesses for him at the trial. It was impossible for him to know that they had been previously subpoenaed by the defendant, and if this were allowed, it would be necessary, in every case, for one party to make enquiry whether a witness had been previously subpoenaed by the other. The plaintiff having obtained a verdict, is therefore entitled to his costs.

Rule absolute.

---

(a) But see *Crompton v. Hutton*, 3 Taunt. 230.

1817.

GILL, and another, v. HINCKLEY.

Monday,  
Feb. 10.

THE defendant, in this action, (being one of several brought by the plaintiff against him, and many other underwriters, upon a policy of insurance,) had consented to an order to be bound and concluded by such verdict as should be given in the cause of *Gill* and another v. *Dunlop*, to the satisfaction of the judge before whom the same should be tried.

Upon the trial of that cause, before Lord Chief Justice *Gibbs*, at *Guildhall*, the plaintiffs obtained a verdict, subject to a case;—and this court, after argument of that case in the last term (a), confirmed the verdict.—The facts of the case were afterwards turned into a special verdict, in order that the defendant might remove the cause upon a writ of error, to the court of *King's Bench*; and a writ of error being consequently brought, and bail in error put in;

Mr. Serjt. *Best*, in the early part of this term, obtained a rule, calling upon the defendant in this action, to shew cause why the plaintiffs should not be at liberty to sign final judgment, as if a verdict had been given for them for the sum of £100, and to issue execution for that sum, being the amount of the defendant's subscription to the policy, together with the costs of the action, and of this application to the court.

Mr. Serjt. *Lens* was, on this day, about to shew cause,

But, the Court, on the defendant's entering into a rule, that the plaintiffs should be at liberty to enter up judg-

The defendant having entered into a consolidation rule, and the plaintiff obtained a verdict on the cause tried, which was afterwards turned into a special verdict, to enable the defendant to remove it by a writ of error to the *King's Bench*, which was done, and bail put in accordingly.—This court will stay execution in the action against the defendant, till the determination of the writ of error be known, on his giving security to be bound by the judgment of the *King's Bench*.

1817.  
 GILL  
 v.  
 HINCKLEY.

ment in this cause, as if a verdict had been given for them for £100, (being the amount of the defendant's subscription to the policy) with a stay of execution till the determination of the writ of error in the cause of *Gill* and another v. *Dunlop*, were known; he, the defendant, giving such security within fourteen days from the date thereof, to be bound and concluded by the judgment of the court of *King's Bench*, as one of the prothonotaries of this court should approve of, made the

Rule absolute (a).

---

(a) See *Aylwin v. Favine*, 2 N. R. 430.

Wednesday,  
 Feb. 12th.

DOWN, and another, v. DOWN.

A. being seised in fee of divers estates, devises, (*inter alia*), to his wife for life, a farm, called *Coltsfoot-farm*, then on lease to M. F., and also two pieces of woodland, called *Bull's-wood*, and *Howes-wood*, then in his own possession, situate in or near the parish of D.—

After her death,

he gives the woodlands to his eldest son, and all his farms therein-before described, to his third and fourth sons, in fee.—*Held*, that a close, called *William-spring*, adjoining *Bull's-wood*, planted by the testator, and excepted in two leases, under which *Coltsfoot-farm* was held, the one granted to M. F., previous, and the other to W. P. subsequent to the execution of the will, passed as part of *Coltsfoot-farm*, subject to the exception in the former lease.

THIS was an action on the case, in nature of waste, brought to try the title to a certain piece of woodland, called *William-Spring*, situate in the parish of *Datchworth*, in the county of *Hertford*, which came on to be tried before the Right Honorable Lord *Ellenborough*, at the last assizes for that county, when a verdict was found for the plaintiffs, subject to the opinion of this court, on a case, of which the following is the substance;—*Richard Down*, the testator, was the father, as well of the plaintiffs, who were his third and fourth sons, as of the defendant, who was his eldest son, and heir at law.

At the time of his death he was seised in fee of several farms and lands, in the respective parishes of *Ware*, *Stevenage*, *Datchworth*, *Walwyn*, and *Tewyn*, in the county of *Hertford*; and, *inter alia*, of a farm, called *Coltsfoot-farm*, situate in the parish of *Datchworth*, and also of two pieces of woodland, called *Howes-wood*, and *Bull's-wood*, adjoining the said farm.—*Coltsfoot-farm* consisted of about one hundred and seventy-two acres;—*William-spring*, comprising seven acres, was held as part of that farm, and it was necessary, in order to pass from the upper to the lower part of the farm, to go through this close, in order to avoid a more circuitous road.—In 1783, *Coltsfoot-farm* was let on lease to one *Pennyfeather*.—The testator, with his consent, had the close in question ploughed and sowed with acorns; it was also fenced in to protect it from cattle, but the road through it was left open: It remained in the possession of the testator until his death, and the underwood was cut by him, and since it was so planted, it has never been held by the tenant of *Coltsfoot-farm*.—Before the close was sown with acorns, it was separated from *Bull's-wood*, by a hedge and ditch. The hedge is fallen down, but the ditch still remains.—On the 24th of *December*, 1803, a new lease was granted to *Mary Field*, (the widow of the former tenant, *Pennyfeather*) of *Coltsfoot-farm*, containing by estimation one hundred and seventy-two acres, more or less, (excepting to the testator and his wife, and the person or persons to whom the freehold of the same premises should belong, a certain piece of ground, part of the said one hundred and seventy-two acres, some time since planted by the testator with acorns, and which was then a young wood, called *William-spring* :)—to hold the same, subject to the above exception to *Mary Field*, for a term of ten years, at the yearly rent of £150.—On the 10th of *May*, 1813, another lease was granted to *Wm. Pennyfeather*, the son

1817.

Down  
v.  
Down.

1817.  
 Down  
 v.  
 Down.

of *Mary Field*, by her first husband, excepting to the testator and his wife, and the person or persons to whom the freehold and inheritance of the same premises should belong, a certain wood, called *William-spring*. No abatement was made in the tenant's rent by the testator having taken *William-spring* into his own possession, and *Coltsfoot-farm* would not have consisted of one hundred and seventy-two acres, unless *William-spring* were considered as part of it.—On the 19th day of *August*, 1808, the testator duly made and executed his will, and after several other bequests of real property to his wife, devised to her as follows:—  
 ‘And also my messuage, or tenement, farm, and lands,  
 ‘called *Coltsfoot-farm*, situate in or near the parishes of  
 ‘*Datchworth*, *Walwyn*, and *Tewyn*, in the said county of  
 ‘*Hertford*, now on lease to *Mary Field*, widow; at the  
 ‘yearly rent of £150, and also the two woods, or pieces  
 ‘of woodland, now in my own possession, called *Howes-*  
 ‘*wood* and *Bull's-wood*; containing together thirty-four  
 ‘acres and upwards, situate in or near the said parish of  
 ‘*Datchworth*, to hold all the said premises to his wife,  
 ‘and her assigns, for her life.’—He then devised to the  
 defendant, his eldest son, *John*, after the decease of his  
 wife, (among other estates) in these words:—‘And also  
 ‘my said two woods, called *Howes-wood*, and *Bull's-wood*,  
 ‘to hold to the use of his said son *John*, his heirs and  
 ‘assigns for ever.’—The testator then devised certain  
 estates described in the will, to his second son, after the  
 decease of his wife, in fee, and to his third and fourth  
 sons, (the plaintiffs), he devised in like manner, (after the  
 death of his wife), in the words following, viz.—‘I give  
 ‘and devise unto my third son, *Henry*, and my fourth  
 ‘son *Richard*, from and immediately after the decease of  
 ‘my said wife, all and singular my said farms, lands,  
 ‘messuages, cottages, and premises, (herein before de-

‘scribed), situate in the parishes of *Stevenage*, *Datchworth*,  
‘*Walwyn*, and *Tewyn*, to hold all and singular the said  
‘farms, lands, and premises, to the use of my said two  
‘sons, *Henry* and *Richard*, their heirs and assigns for  
‘ever, in equal shares, as tenants in common, and not as  
‘joint-tenants.’—The defendant entered into the close  
called *William-spring*, and cut the wood growing there,  
claiming to be entitled to it as heir at law to the testator,  
and as undisposed of by his will. The plaintiffs claim  
to be entitled to it as still being part and parcel of *Colts-*  
*foot-farm*, and brought the present action as devisees in  
reversion. The question for the opinion of the court  
was, whether the plaintiffs were entitled to recover; if  
the court should be of opinion that they were so entitled,  
the verdict to be entered for them. If the court should  
be of a contrary opinion, then the verdict to be entered  
for the defendant.—The case came on for argument, on  
a former day in this term, when,

Mr. Serjt. *Best*, for the plaintiffs, contended, that the  
close in question passed to them by the last clause of the  
will. He observed that if there were nothing to control  
its operation, no doubt could exist. The whole of  
the testator’s farms and lands, situate in the respective  
parishes of *Stevenage*, *Datchworth*, *Walwyn*, and *Tewyn*,  
were, by that clause, devised to the plaintiffs, after the  
decease of his wife. It was impossible that the words,  
(herein-before described) could refer only to the messuage  
or tenement, called *Coltsfoot-farm*. The testator devises  
two woods, called *Howes-wood* and *Bull’s-wood*, which are  
also situated in the parish of *Datchworth*, to his eldest  
son. He does not give any lands, as described, in either  
of the parishes mentioned in the last clause, to his first,  
or second sons; and, therefore, they all pass to his third  
and fourth. It had been insisted by the defendant, that  
*William-spring* could neither be considered a part of *Colts-*

1817.  
 DOWN  
 v.  
 DOWN.



1817.

Down  
v.  
Down.

*foot-farm*, nor of *Bull's-wood*, nor of *Howes-wood*; and that, therefore, the testator died intestate as to *William-spring*, and that it consequently passed to him, as his heir at law; it could not be the intention of the testator to give these two woodlands to his eldest son, and omit *William-spring*, which was adjoining, and separated from *Bull's-wood* by a hedge and ditch. [Mr. Justice Burrough observed, that the case of *Doe d. Harris v. Greathead* (a), was applicable to this part of the argument.]—That case was distinguishable from the present, as there the devise was confined to lands lying in a particular county. Here, all the lands are situated in the parish of *Datchworth*, and there are no words to restrain or narrow the intention of the testator;—the principal point is, whether *William-spring* can be considered as part of *Coltsfoot-farm*. The reservation in the first lease fully proves the intention of the testator. The timber is reserved in both. The testator, himself, occupied *William-spring*, and, therefore, reserved it to himself. The admeasurement of *Coltsfoot-farm* was estimated at one hundred and seventy-two acres: If, therefore, *William-spring* were not considered as part of it, it would only comprise one hundred and sixty-five acres. In the second lease, the farm is stated to comprise one hundred and seventy-two acres, (excepting *William-spring*), as belonging to the person to whom the freehold and inheritance of the same premises should belong. For whom, therefore, was *William-spring* reserved? not to the heir at law, nor to a devisee; but to the person to whom the freehold of *Coltsfoot-farm* should belong. He, therefore, not only devises it to the plaintiff, by will, but reserves it by these two leases. In the case of *Goodtitle d. Radford v. Southern* (b), it was held, that the testator considered certain closes as parcel of *Troques farm*, as he gave a notice to quit before

---

(a) 8 E. R. 91.—(b) 1 M. & S. 299.

the making of his will, describing them to belong to *Troques* farm. The leases, in this case, evidently evince the intention of the testator more forcibly than that notice. He therefore insisted, that at the expiration of the second lease, the property in *William-spring* passed to the plaintiffs, as devisees, and although it was excepted in both the leases, it was merely to deprive the tenants of the occupation of it, and to describe it as being a part of *Coltsfoot-farm*, subject to such exceptions.

Mr. Serjt. *Pell*, *contra*, submitted that it was a general principle of law, that an heir at law could not be dispossessed, but by express words, and that as the construction of the will was at all events doubtful, the defendant was entitled to the close called *William-spring*.—Thirty-three years before the testator made his will, that close was severed from *Coltsfoot-farm*, of which it was before a part.—The hedge separating it from *Bull's-wood* was taken down, and the ditch was the only boundary; and *William-spring* being planted with oak, it was considered by the testator as woodland. This circumstance clearly shews, that he intended that it should not be considered thereafter as part of *Coltsfoot-farm*. The underwood was cut by the testator, together with *Bull's-wood* and his other woodlands. As the testator took possession of the close, in 1783, it could not be considered as part of *Coltsfoot-farm*, from that period till 1803, when a lease was granted to *Mary Field*, widow, of *Coltsfoot-farm*, excepting *William-spring*. The principal difficulty exists in the description of the quantity of acres of which *Coltsfoot-farm* is described, in that lease, to consist. The former part of the lease was confirmed by the subsequent reservation, and the same exception was made in the lease to *Pennyfeather*, in 1813. The testator made his will, between the periods of the two leases, and devises to his wife, for life, certain estates, and (*inter alia*) a messuage,

1817.  
 ~~~~~  
 Down  
 v.  
 Down.

1817.

Down

v.

Down.

called *Coltsfoot-farm*, now on lease to *Mary Field*, widow. It is clear, that *William-spring* was excepted in that lease, and therefore it could not pass under that clause of the will. The plaintiffs, therefore, can only claim that part of the farm which was in her possession, under that lease. They rest their claim on the last clause of the will, as passing to them all the estates thereinbefore described, of which *Coltsfoot-farm* is one; but that farm is particularly mentioned, as being let on lease to *Mary Field*, widow. If the defendant be not entitled to *William-spring*, as heir at law, (the testator having died intestate of it), he might still claim it as a devisee, under the clause, which gives him *Bull's-wood* and *Howes-wood*, for it might be now considered as part of *Bull's-wood*, as it is severed only by a ditch, and has not been rented or considered as part of *Coltsfoot-farm*, for more than thirty years past. [Mr. Justice *Dallas*. The road through *William-spring* still remains open.]—That circumstance will make no alteration as to the effect of the will. The road may be considered as leading to *Coltsfoot-farm*, to avoid a more circuitous way. The testator had the whole of the property in his possession; and, therefore, laid out the roads leading from one farm to another.—The case of *Goodtitle d. Radford v. Southern* was hastily disposed of, on a motion to set aside a non-suit, and the only question there was whether certain lands were parcel, or no parcel of *Trogues farm*.—In the case of *Doe d. Oxenden v. Chickester*, (In *Dom. Proc.*) (a), “it was held, that, where one having lands in the manor of *Ashton*, in *Ashton* parish, and also other lands in several of the neighbouring parishes, made his will, and devised lands, under the description and name of ‘my estate of *Ashton*,’ and parol or extrinsic evidence was offered to shew that the testator, in his life-

---

(a) 4 *Dow's Rep.* 65.

time, was accustomed to designate the whole of the lands, derived from his mother, including, not only the estate at *Ashton*, but also the lands in the neighbouring parishes, by the general name of his *Ashton estate*.—The House of Lords concurring in the unanimous opinion of the judges, held, that the evidence had been properly rejected.” The former case, therefore, was overturned by that decision, and in conformity to the judgment of Lord Chief Justice *Mansfield*, in *Doe d. Chichester v. Oxenden* (a), the court of *King’s Bench*, in the case of *Doe d. Browne v. Greening* (b), have held that where the testator devised all his estate and interest in lands at *Coscomb*, evidence was not admissible to shew that another estate, not at *Coscomb*, was formerly united to, and had been ever since enjoyed with the estate at *Coscomb*, in order to shew that it passed under the devise. In this case, therefore, the defendant is entitled to the close in question, either as devisee under the will, as forming part of *Bull’s-wood*, or as heir at law, it not having been disposed of by the last clause, because it did not form a part of *Coltsfoot-farm*, then let on lease to *Mary Field*, as described in the former clause of the devise to the testator’s wife, for life.

Mr. Serjt. *Best*, in reply, observed, that as there was no fence necessary to separate *William-spring* from *Bull’s-wood*, it was suffered to fall into decay. This was strong evidence, that it was intended by the testator, that the close should continue as part of *Coltsfoot-farm*.—The whole of the will must be construed together.—The case of *Goodtitle d. Radford v. Southern*, was precisely in point; but those cited of *Doe d. Oxenden v. Chichester*, and *Doe d. Browne v. Greening*, were wholly inapplicable, as these latter depended on the admission of extrinsic

1817.  
 ~~~~~  
 Down  
 v.  
 Down.

---

(a) 3 Taunt. 156.—(b) 3 M. & S. 171.

1817.  
  
 Down  
 v.  
 Down.

or parol evidence, to enlarge the effect of the terms of a will. Here the intention of the testator is apparent on the face of the whole of his will, and the clause of reservation in the last lease is sufficient to shew that he considered *William-spring* to be part of *Coltsfoot-farm*.

*Cur. ado. vult.*

On this day, Mr. Justice DALLAS delivered the opinion of the court, and after briefly recapitulating the leading features of the case, proceeded as follows:—No question in this case arises, as to the admissibility of extrinsic evidence to explain either the extent or limitation of the intention of the testator, otherwise than is contained in his will. Neither is this a question of law, as to the express words used by the testator, nor is it a necessary implication, that *William-spring* could not pass by the will. If *William-spring* remained undisposed of, and did not so pass, it would consequently go to the defendant, as heir at law. There is no doubt of the intention of the testator, as to the disposition of his property.—The court cannot be governed by any inadvertence of the testator, but by the general structure of the whole will. The heir at law rests his claim on two grounds.—*First*, that *William-spring* is part of *Bull's-wood*, and had therefore passed to him under the first part of the devise.—*Secondly*, If it was not so, that then it was undisposed of by the will, having ceased to be part of *Coltsfoot-farm*: As to the first claim, there can be no doubt, for *William-spring* could not pass to the defendant, as part of *Bull's-wood*, although it were not part of *Coltsfoot-farm*. As to the second, If *William-spring* be not part of *Coltsfoot-farm*, by the exception in the former lease of 1803, and the hedges be now decayed, there can be no room for exception in the lease of 1814. The testator clearly considered it as being part of *Coltsfoot-farm*. The will was made between the periods of granting

the two leases, and *William-spring* was excepted, as part of *Coltsfoot-farm*, in both the leases. The testator's intent was not to die intestate, as to *William-spring*, but he meant that it should pass as part of *Coltsfoot-farm*, then in the possession of *Mary Field*, widow, subject to the exception. We are therefore of opinion, that the plaintiffs are entitled to it, as devisees under the will.

Judgment for the plaintiffs accordingly.

1817.

Down

o.

Down.

#### HORSFALL v. TESTAR.

Wednesday,  
Feb. 12th.

THE plaintiff declared upon a covenant in an indenture of lease, bearing date the 24th of *December*, 1768, and made between *Henry Penton*, and *John Weston*, whereby *Penton* demised to *Weston* certain premises for fifty-six years, from *Midsummer* then last past, in which indenture *Weston* covenanted to repair the premises, and maintain all the walls thereto belonging, *as often as need or occasion should require*.—The conveyance of *Penton's* interest to the plaintiff was then set out, and an assignment of the residue of *Weston's* term to the defendant. The plaintiff assigned for breach that the defendant did not repair the premises, and maintain all the walls, but that on the contrary thereof, he destroyed part of one of the walls belonging to the premises, and built a brestsummer in lieu thereof. The defendant, among other special pleas, which were irrelevant to the question in this case, pleaded *non est factum*. On the trial of the cause, at the sittings at *Westminster* after last term, before Lord Chief Justice *Gibbs*, it appeared, on the production of the lease, that

An indenture of lease, containing a covenant by the lessee, 'to repair the premises at all times, (as often as need or occasion should require,) and at farthest within three months after notice,' is one entire covenant, the former part of which is qualified by the latter. The plaintiff having treated this in his declaration as an absolute covenant to repair, and omitted the latter part of the clause, containing the notice.—*Held*, that the variance was fatal.

1817.

HORSFALL  
v.  
TESTAR.

*Weston* covenanted to repair the premises, and maintain all the walls thereto belonging, at all times thereafter, (as often as need or occasion should require), and *at farthest within three months after notice of any decay* or want of reparation should be given by *Penton*, or left for *Weston* at the demised premises. His lordship, considering that the latter part of the covenant qualified the former, and that it could not be deemed distinct and independent, nonsuited the plaintiff, on the ground that the declaration did not set out that part of the covenant by which the three months notice was stipulated to be given.

Mr. Serjt. *Lens*, on a former day in this term, obtained a rule to shew cause why the nonsuit should not be set aside, and a new trial granted.

Mr. Serjt. *Best* and Mr. Serjt. *Copley*, on a subsequent day, shewed cause against the rule; and observed, that the only question was, whether the variance appearing on the face of the record, in not having set out the latter part of the clause of the indenture in the declaration, was material. They contended, that if the latter part of the clause did not vary the effect of the former, the rule must be made absolute, but that the whole of the covenant must be connected; and that, therefore, it was all one sentence, the latter part of which varied or qualified the former, and that no action could be maintained by the plaintiff for want of reparation, until three months after notice of such non-repair had been left for the lessee at the demised premises. If the plaintiff had assigned breaches for permissive waste, it would be necessary for him to give three months notice, before he brought his action. The latter part of the covenant enlarges the operation of the former, and it is therefore necessary in declaring on the covenant to set it out exactly in the same terms as those contained in the lease.

Mr. Serjt. *Lens*, in support of the rule, insisted that the defendant, as lessee of the premises, was liable to an action for a breach of covenant immediately on the premises being out of repair, *and at farthest*, within three months. These, therefore, are distinct and separate covenants. The former is properly pleaded as a general covenant, according to its true sense and effect, and is not qualified by the terms of the latter, and there is no foundation, in substance, for the objection that has been raised. The intention of the parties manifestly shews that this is not one covenant. The lessor clearly meant that the lessee should keep the premises in a proper state of repair at all times, during the continuance of the demise. The breach applies to the destruction of part of a wall, and building a brestsummer in lieu thereof. The defendant is therefore obliged to repair the injury done immediately. He cited the case of *Roe d. Goatly v. Paine (a)*, as not being incompatible with the present, and relied on *Howell v. Richards (b)*, to shew that the covenants in this case were distinct and different (*c*). The covenant to repair in this case is not restrained by any qualifying context, and the injury accruing to the plaintiff arises on the defendant's not having repaired according to the former covenant, which would be inefficient, if the latter were construed as a qualifying or continuous covenant.

*Cur. adv. vult.*

On this day, Mr. Justice DALLAS delivered the judgment of the court, as follows:—In this case, we are of opinion that the nonsuit ought not to be set aside. The general rule is, that a covenant in a deed must agree in substance with that stated in the declaration. This is a qualified, and not an absolute covenant in the lease; but

1817.  
HORSFALL  
v.  
TESTAR.

---

(a) 2 Camp. 520.—(b) 11 E. R. 633.—(c) See also *Hesse v. Stevenson*, 3 B. & P. 565.



1817.  
 HORSEFALL  
 v.  
 TESTAR

it appears on the face of the declaration to be absolute. It is set out as a covenant to repair at all times, when need or occasion shall require, and the breach is framed accordingly. In the lease, the covenant is to repair, as often as occasion shall require, and at farthest within three months after notice. This, therefore, is not a covenant to repair generally; but it is absolutely necessary that three months notice should be given, previous to the commencement of the action. The variance is in substance, and not in form; as the latter words of the sentence are wholly omitted in the declaration. If the covenant were distinct, or stated in another part of the lease, it would alter the case; but this cannot be deemed a separate or distinct covenant, for the latter part must be joined, in order to make the sentence complete. The first part of the covenant is to repair, and is qualified by the latter within three months after notice: according to this construction, the whole is one entire covenant, and the generality of the former part is restrained by the terms of the latter. The whole, therefore, must be taken together, and as the latter part, being material, is not stated in the declaration, the rule must be

Discharged.

Wednesday,  
 Feb. 12th.

SILVERSIDES v. BOWLEY.

The plaintiff had holden the defendant to bail, and a verdict was taken for him at the trial, subject to an order of reference for ascer-

**M**r. Serjt. *Pell*, on a former day in this term, had obtained a rule *nisi*, that the defendant should have his costs taxed by the prothonotary, and set against the damages recovered by the plaintiff according to stat. 43 *Geo.* 3. **U**pon an application to the court to allow the defendant his costs pursuant to 43 *Geo.* 3. c. 46.—*Held*, that in order to entitle the defendant to such costs, he must show that the arrest was vexatious and malicious.

c. 46. s. 3. (a)—The rule was granted on an affidavit of the defendant, which stated that the plaintiff was employed by him to furnish marble chimney-pieces, and perform certain masonry, according to the terms of an agreement entered into between them, and which he refused to complete. That the materials the plaintiff had furnished, and the labour he had performed, were estimated by a surveyor at £40, and that the plaintiff had received from the defendant the sum of £33 : 8s., previous to the commencement of this action, and that according to the terms of his agreement, he had been fully compensated. That, notwithstanding this, the defendant was held to bail for £20, and upwards, and that on the trial of the cause in this term, the agreement, on being produced in evidence by the defendant, was rejected, in consequence of its not being stamped, when the plaintiff being entitled to a verdict, the amount of the damages were left to the award of an arbitrator, who found that £11 : 4s. : 6½d., only were due to the plaintiff. The affidavit concluded by averring that the plaintiff was actuated by malice, and had no probable cause for arresting the defendant.

Mr. Serjt. Copley now shewed cause against the rule, on affidavits of the plaintiff, his attorney, and a surveyor, which stated, that the plaintiff had engaged with the defendant to do the masonry at certain prices, and that the defendant should advance money to the plaintiff to purchase marble, and pay him for the masonry as the work proceeded; and that in consequence of such advances not being made, he was unable to proceed, when

1817.  
SILVERSI  
v.  
BOWLEY.

---

(a) This section authorises costs to be awarded to a defendant, if the plaintiff do not recover the sum for which he held the defendant to bail, and had no reasonable or probable cause for holding him to bail to that amount: and, that in case the sum recovered should be less than the amount of the defendant's costs, the defendant shall be entitled, after deducting the sum recovered by the plaintiff from the amount of his costs, to take out execution for such costs, in like manner as defendants may now by law have execution for costs in other cases.

1817.  
  
 SILVERSIDES  
 v.  
 BOWLEY.

the defendant would not allow him to complete his work, but employed another person. The plaintiff, therefore, applied to a surveyor, who valued the work done by him at £57 : 8s. : 9½d.—That the plaintiff had received £33 : 8s. from the defendant, leaving a balance of £24 : 0s. : 9½d., for which he arrested the defendant.—That a copy of the account was sent to the defendant, by the plaintiff's attorney, but payment was refused; he then denied that he was actuated by malice, conceiving the latter sum to be due to him from the defendant.—The surveyor deposed, that the plaintiff was entitled to recover £57 : 8s. : 9½d., and that the prices of the marble furnished were far below the trade prices.—The plaintiff's attorney stated that the plaintiff had offered to leave the sum due to him from the defendant to arbitration, previous to the commencement of the action, which the defendant had refused, and that the arbitrator in the present instance had received the agreement in evidence, although rejected at the trial, and directed a verdict for £11 : 4s. : 6½d. to be entered accordingly.

Mr. Justice DALLAS.—The only question is, whether the plaintiff, by swearing to a greater sum than has been awarded to him by the arbitrator, can be considered as having holden the defendant to bail without any reasonable or probable cause. Nothing, in this instance, can warrant such a supposition. This application must be considered as analogous to an action on the case for a malicious arrest, which cannot be supported, unless malice be averred and proved (a). It was improper for the defendant to call in a surveyor, on his part, to estimate the value of the work done, without giving notice of the valuation to the plaintiff, particularly as there was an agreement existing between the parties. The consent of the

---

(a) See *Scheitel v. Fairbairn*, 1 B. & P. 388.—*Gibson v. Chatels*, 2 B. & P. 189.

ntiff to leave the amount of the damages to an arbiter, excludes all presumption of malice on his part, and has, on the contrary, treated the defendant not only with lenity, but indulgence.

Mr. Justice PARK.—The affidavits adduced on the behalf of the plaintiff are sufficient to shew that he had probable cause to arrest the defendant.—The plaintiff's surveyor had estimated the labour and materials at £57, in which sum he had received £33 only. He was therefore warranted in holding the defendant to bail for his remainder. This application is against good faith, and an unjust proceeding on the part of the defendant.

Mr. Justice BURROUGH concurred.

Rule discharged (a).

a) See *Neale v. Porter, Burns v. Palmer*, cited in 2 *Tidd*. 1018, edit.

1817.  
SILVERSIDES  
v.  
BOWLEY.

LANCASTER, demandant; WILMOT, tenant; BOONE, vouchee.

Wednesday,  
Feb 12th.

RECOVERY was suffered in *Easter term*, (16th *Geo. 3.*) which, after a description of divers messuages, lands, common of pasture, and common of turbary, in the parishes of *Tandridge* and *Godstone*, contained the words, 'and the tithes of corn, grass, and hay, yearly arising, growing, and renewing from and out of the said premises, and also the advowson of the vicarage of the church of *Godstone*, in *Surrey*.'—In the last term this recovery was amended, by adding the words, 'and all other tithes, arising, growing, and renewing, from and out of the said messuages in *Tandridge*,' after the words, 'corn, grass, and hay,' and before the words 'yearly arising, growing, and renewing.'

Mr. Serjt. *Best* now moved that this recovery might be

A deed to make a tenant to the rectory comprised tithes, in two parishes; but an amendment having been improperly introduced into the recovery which confined its operation to one parish only, the court will allow the words of such amendment to be transposed, so as to give effect to the deed, and comprise both parishes.

1817.

LANCASTER,  
Demandant;  
WILMOT,  
Tenant;  
BOONE,  
Vouchee.

further amended by striking out the words of the former amendment, where they now stand, and inserting precisely the same words, after the words 'the said premises,' and before the words, 'and also the advowson.' The learned serjeant observed, that the former amendment had confined the operation of the recovery to the tithes in the parish of *Tandridge*; whereas, antecedent to that amendment, the original recovery extended to tithes, as well in the parish of *Godstone*, as in *Tandridge*. The premises were described in the deed to lead the uses by which the property is conveyed, as lying and being in the parishes of *Tandridge* and *Godstone*, in the county of *Surrey*, and passes the tithes under these words: 'and also all the tithes of corn, and grass, yearly coming, growing, and accruing, out of, upon, and from all or any of the said lands, hereditaments, and premises thereby granted and released; and all other the messuages, lands, tenements, hereditaments, and premises of *Ann Boone*, and *Elizabeth Boone*, or either of them, in *Tandridge*, and *Godstone*, or elsewhere in the county of *Surrey*.'

The court, considering the terms of the deed sufficiently extensive to comprize all the tithes in the parishes of *Tandridge* and *Godstone*, and that the amendment of the last term had been introduced in an improper part of the recovery, allowed these words to be transposed, and the correction of that amendment was accordingly permitted.

Mr. Serjt. *Best* made this motion in the course of yesterday, but not being then furnished with the deed to lead the uses, the court granted him the indulgence of concluding it on this day, although it was the last of the term (a).

---

(a) See 2 *Marsh.* 328.

# C A S E S

ARGUED AND DÉTERMINED

IN THE

**Courts of Common Pleas**

AND

**Exchequer Chamber.**

IN

*EASTER TERM,*

IN THE

FIFTY-SEVENTH YEAR OF THE REIGN OF GEORGE-III.

VOL. I.

H

*Memoranda.*

In the course of the last vacation, on the 15th of *April*, died the Right Hon. Sir *Alexander Thomson*, Knight, Lord Chief Baron of his Majesty's Court of *Exchequer*, and was succeeded by Mr. Baron *Richards*.

In this Term, on the 6th of *May*, Sir *William Garrow*, Knt., his Majesty's Attorney-General, was appointed to succeed Mr. Baron *Richards* in the Court of *Exchequer*. He was accordingly called to the degree of Serjeant at Law, and took his seat on the Bench. He gave rings with the motto, '*Fas et Jura*.'

On the 7th day of *May*, in this Term, Sir *Samuel Shepherd*, Knt. his Majesty's ancient Serjeant and Solicitor-General, was promoted to the office of his Majesty's Attorney-General, in the place of Sir *William Garrow*; and on the 9th day of *May*, *Robert Gifford*, Esq., was promoted to the rank of Solicitor-General to his Majesty, and was knighted accordingly.

1817.  
}

DUNCAN, Gent. one &amp;c. v. RICHMOND.

Thursday,  
April 24th:

**Mr.** Serjt. *Bosanquet* moved that the plaintiff, an attorney of this court, should deliver over to the defendant certain deeds, papers, and writings, on payment of the debt and costs in this action. This motion was made on an affidavit of the defendant, which stated that this action was brought by the plaintiff for the recovery of a bill of costs relative to a suit in the court of *Exchequer*, in which the plaintiff was employed by the defendant, and a person of the name of *Hooker*, as their attorney. That the defendant was ready to pay the amount of the debt and costs in this action, on having all deeds and papers to which he might be entitled, delivered up to him.

Where deeds are delivered to an attorney, by *A.* and *B.* jointly, for the purpose of carrying on a suit in the *Exchequer*. This court, upon motion by *A.* alone, will not order such deeds to be delivered up, on payment of the debt and costs by him, as they could not bring *B.* before them, nor bind his rights in his absence.

But the court thought that they could not bring *Hooker*, the co-defendant in the court of *Exchequer*, before them by this summary mode; neither could they bind his rights in his absence (*a*), and as the deeds might have been delivered either by him alone, or by him and the present defendant jointly, it was impossible to determine on whose deeds the plaintiff had a lien.

The learned serjeant took nothing by his motion.

---

(a) See *Hughes v. Mayre*, 3 *T. R.* 275, and the cases cited in *Tidd's Practice*, 6th edit. p. 78.



1817.

Thursday,  
April 24th

JONES v. HILL.

An action on the case for permissive waste is not maintainable against a tenant for years, if he hold premises under an express contract or covenant to repair.

THIS was an action on the case in the nature of waste. The declaration stated that the defendant held certain messuages, as tenant to the plaintiff, for the remainder of a term of years, upon a general condition to repair and leave the premises in as good plight and condition as the same were in, when finished under the direction of a surveyor. —*Breach*, for not repairing during the term, and yielding up the premises in much worse order than when the same were finished under the direction of the surveyor.

The cause came on for trial before Mr. Justice *Dallas*, at the last assizes at *Kingston*, when the learned judge non-suited the plaintiff, but reserved the point for the determination of this court, whether the action was maintainable, on the ground that the defendant was a tenant for years, under a lease; and that the plaintiff should therefore have declared in covenant.

Mr. Serjt. *Vaughan* now moved to set aside the nonsuit, and contended that the action was maintainable against the defendant as tenant for years, and observed that the cases determined on this subject extended only to tenants at will.—He cited the Countess of *Shrewsbury's* case (a), and *Gibson v. Wells* (b). In support of his motion he relied on the statute of *Gloster* (c), by which a tenant for years is liable to the lessor in an action on the case in the nature of waste, if he permits a house to be out of repair,

---

(a) 5 *Coke's Rep.* 13.—(b) 1 *N. R.* 290.—(c) 6 *Edw.* 1. c. 8.

unless it was ruinous at the time the lease was granted (a), and that statute extends to permissive as well as voluntary waste (b). Although a tenant at will is not liable for permissive waste, a tenant for years must be, for the latter is within the statute (c). This distinction is drawn by Mr. Serjt. *Williams*, in a note to *Pomfret v. Ricraft* (d); and in another note of that learned serjeant to *Green v. Cole* (e), it is stated that this is the usual action, as well for permissive as voluntary waste, and in the case of *Kinlyside v. Thornton* (f), it was determined that though the lessee covenanted to yield up the premises repaired at the end of the term, the lessor had his election to bring either an action on the case, or of covenant against the lessee, for waste done by him during the term. The case of *Herne v. Bembow* (g) differed very materially from the present, as the declaration there alleged the waste to be permissive, by a tenant who held under a lease which contained no covenant to repair.

Lord Chief Justice GIBBS.—When there is an express stipulation or contract between two parties, this species of action is not maintainable, for such contract is a total waiver of tort, and it therefore ceases to bear the character of waste. There is a very wide distinction, at common-law, between wilful and permissive waste; and, in the case of *Kinlyside v. Thornton*, the tenant had committed waste by pulling down and taking away fixtures which belonged to the premises.—The defendant, in this case, has covenanted to repair and to leave the premises in such a state as a surveyor shall have first placed them in; the plaintiff, therefore, should have

1817  
JONES  
v.  
HILL.

---

(a) *Co. Litt.* 54, b.—(b) 2 *Inst.* 145. *Co. Litt.* 53, a. 2 *Roll. Abr.* 816. pl. 36. 7.—(c) 2 *Inst.* 302. *Co. Litt.* 54, b.—(d) 1 *Saund.* 323. b.—(e) 2 *Saund.* 252. c.—(f) 2 *Sir W. Black.* 1111.—(g) 4 *Taunt.* 764.

1817. brought his action on the covenant in the lease under  
 which the premises were demised to the defendant.  
 JONES  
 v.  
 HILL. *Per Curiam,* Rule refused (a).

---

(a) See *Hargrave and Butler's* note, 359 to *Coke Littleton*, 54, b. 15th edit., where it is laid down that if a lessee covenant to repair and doth not repair, waste will not lie.—29 E. 3. 43. 21 H. 6. 6. *Dyer*, 198. *Hal. MSS.*

---

Monday,  
 April 28th.

WOGAN v. SOMERVILLE.

In an action for a libel upon the plaintiff, who had served upwards of three years, as house apothecary at a public infirmary, before the passing of stat. 65 G. 3, c. 194. Held, that such service was sufficient to qualify him to act as an apothecary, and superseded the necessity of an apprenticeship, or the production of a certificate, in conformity with the regulations of that statute.

THIS was an action for a libel published in a newspaper. The declaration charged the defendant with having written and published a libel on the plaintiff in his character of surgeon and apothecary, whereby he was injured in his business. At the trial of the cause, before Mr. Justice *Park* at the last assizes at *Stafford*, the plaintiff, in order to shew that he was qualified to act as a surgeon, adduced in evidence a diploma from the College of Surgeons in *London*, but produced no certificate of being an apothecary, or of having practised as such. It was also proved that the plaintiff had never served the apprenticeship required by the apothecaries act (55 G. 3, c. 194.) but, that before the passing of that act, he had filled the situation of house apothecary to the *Stafford* infirmary, and had never practised, or been employed as an apothecary, except at the infirmary. On the part of the defendant it was objected, that the plaintiff must be non-suited, because he had not produced any evidence of his being a regular apothecary; but the learned judge being of opinion that the apothecaries act did not affect per-

sons in practice at the time of passing that act, and as the plaintiff's situation, as house apothecary to the infirmary, was within the exception contained in that statute, refused to non-suit the plaintiff, but saved the point. The jury consequently found a verdict for the plaintiff for £50.

The *Solicitor-General* now moved for a rule *nisi*, that the verdict should be set aside, and a nonsuit entered. He relied on the 14th section of 55 G. 3, c. 194. (a), and insisted that the plaintiff, having been merely a servant at the infirmary, having served no regular apprenticeship, and produced no certificate, as required by that statute, was not entitled to a verdict.

Lord Chief Justice GIBBS.—The situation the plaintiff held at the infirmary, is a sufficient protection to entitle him to the exception in the 14th section of stat. 55 G. 3.

Mr. Justice PARK.—It was proved at the trial that the plaintiff had practised as the house apothecary for more than three years. The stat. 55 G. 3. can only apply to persons who have not practised as apothecaries before the day on which it was passed. The defendant entitled the plaintiff an apothecary in the libel.

Mr. Justice DALLAS and Mr. Justice BURROUGH concurring,

Rule refused (b).

(a) By which it is enacted, "That it shall not be lawful for any person or persons (except persons already in practice as such) to practise as an apothecary in any part of *England or Wales*, unless he or they shall have been examined by the court of examiners, or the major part of them, and have received a certificate of his or their being duly qualified to practise as such from the court of examiners, or the major part of them, who are thereby authorized and required to examine all person and persons applying to them for the purpose of ascertaining the skill and abilities of such person or persons in the science and practice of medicine, and his or their fitness or qualification to practise as an apothecary; and the court of examiners or the major part of them, are thereby empowered, either to reject such person or persons, or to grant a certificate of such examination, and of his or their qualification to practise as an apothecary."

(b) See *Smith v. Taylor*, 1 N. R. 196.

1817.  
WOGAN  
v.  
SOMERVILLE.

1817.

Monday,  
April 28th.

## MATTHEWS v. DICKINSON, and another.

A commission of bankruptcy recited that *A. B.* became bankrupt with intent to defraud *C.* and *D.* surviving partners of *Edmond Darby*, but the writ of supersedeas stated them to be surviving partners of *Edward Darby*.—*Held*, in an action for maliciously suing out the commission, that the variance was fatal.

THIS was an action on the case for maliciously suing out a commission of bankrupt. The declaration stated that the commission had been superseded, and upon the trial of the cause before Mr. Justice *Burrough* at the last assizes for *Worcester*, the *Lord Chancellor's* order for superseding it, and the writ of supersedeas, were produced.—In the commission it was recited, that the bankrupts had become bankrupts with intent to defraud *A, B, C,* and *D,* surviving partners of *Edmond Darby*, deceased; but in the supersedeas the corresponding recital stated them to be surviving partners of *Edward Darby*, deceased. The learned judge was of opinion that the variance was fatal, and consequently directed a nonsuit.

On this day, Mr. Serjt. *Best* moved that the nonsuit might be set aside, and a new trial granted. He insisted that as there was no other commission sued out against the plaintiff, the supersedeas could only be applicable to such commission; that the description of the petitioning creditors did not appear material, either in the commission or the supersedeas, but that, the names of those against whom the commission was directed were sufficient.—He contended, that the order of the *Chancellor* for superseding the commission was regular, and that, that alone was sufficient to shew that the commission had been superseded; and he urged, that at any rate, the court should allow a new trial, on the payment of the costs of the nonsuit, and that it was extremely hard, that the plaintiff, who had made no slip in the proceedings at common

law, should suffer for a mistake, which had its origin from the officer in the court of *Chancery*.

Lord Chief Justice GIBBS.—This is an action for maliciously suing out a commission of bankruptcy against the plaintiff; unless the commission be superseded, the action is not maintainable. In order to shew that it was superseded, the plaintiff produced the commission, in which it appeared, that the bankrupts had become bankrupt with intent to defraud the defendants as surviving partners of *Edmond Darby*; in the supersedeas the Christian name was *Edward*. It has been contended, that the order of the *Chancellor* is sufficient to shew that the commission was superseded; but I am not of that opinion; if a judgment were obtained against *William Dickinson*, and a writ of execution sued out against him by the name of *Thomas*, it would be irregular. It is hard that the plaintiff should suffer from an error of the officer in the court of *Chancery*, but the supersedeas should have corresponded with the order. This mistake might have been set right by an application to that court.

The rest of the court concurring,

Rule refused.

1817.

MATTHEWS  
v.  
DICKINSON.

1817.

Tuesday,  
April 29.

PROSSER, and another, v. HOOPER.

The plaintiff bought saffron of an inferior quality, which, having kept six months, and sold part, he then objected that the article was not saffron.—*Held*, in an action for a breach of warranty, that from the length of time and inferior price given, it was such an article as the plaintiff intended to purchase.

THIS was an action brought against the defendant for a breach of the warranty contained in the following contract for sale.

London,  
November 28, 1815.

Messrs. Prosser and Mason,

We have this day bought, by your order, and for account of *Hooper, Ward, and Payne*, about 100lbs. of saffron, at 48s. per lb., customary allowances.

Prompt,  
fourteen days.

Discount at 2½ per cent. on four months.

*Ward & Payne.*

The declaration contained a warranty that it was merchantable saffron.

The cause was tried before Mr. Justice *Dallas* at *Guildhall*, at the sittings after the last term, when it was proved by two witnesses, on behalf of the plaintiffs, that the article sold was not saffron, but that a fourth part consisted of a vegetable resembling it, which it was impossible to detect at the time of the sale.—The broker, who made the contract, was called for the defendant, who stated that the plaintiffs knew that the saffron was of an inferior quality, and that they paid for it accordingly, at the rate of forty-eight shillings per lb., when the best was worth seventy-three shillings. It was further proved that the plaintiffs examined the bulk; refused to buy by sample; that they kept it six months without objecting to the article, and that they had sold part of it, when they insisted

that it was not saffron, and brought their action accordingly. It was urged by the plaintiff's counsel that the keeping of the article for six months could not do away the contract, which was for the purchase of saffron, and that the maxim of *caveat emptor* could not be set up as a defence for the non-performance of a written contract. The jury, however, found a verdict for the defendant.

Mr. Serjt. *Best* now moved that this verdict should be set aside and a new trial granted. He contended, that it was necessary for the plaintiffs to have the whole of the commodity, saffron; that as it was not so, the warranty was broken, and they were therefore entitled to a verdict. If it had been saffron of different qualities, however inferior, the contract would have been satisfied; but as it had been sold by the name of saffron, it was necessary that the whole of it should consist of that article. He referred to the case of *Yeats v. Pim (a)*, as somewhat resembling the present, and Lord Chief Justice *Gibbs* had there held, that where a party undertakes to supply goods of a certain description, he must execute his agreement accordingly. That principle is particularly applicable to this case, which is stronger than that of *Yeats v. Pim*, as there, the article sold was not prime bacon, but tainted; here the article sold was of a different description to that specified in the contract. The earlier cases establish this principle. Mr. Justice *Doderidge* in the case of *Southern v. How (b)*, has held, that if a goldsmith make plate in which he mixes dross, so that it is inferior to the standard, and send his servant to sell it, who sells it for good plate, an action lies against the master, to which decision Chief Justice *Montague* assented, because it failed in price. The distinction is

1817.  
  
 PROSSER  
 v.  
 HOOPER.

---

(a) 2 *Marsh.* 141.—(b) *Cro. Jac.* 471.



1817.

PROSSER

v.

HOOPER.

this, if an article be of the same sort, though inferior in value, an action would not be maintainable, but if it be of another description, then an action lies. In *Hern v. Nichols* (a), which was an action on the case for a deceit, by a factor, in the sale of silk, the plaintiff declared that he bought several parcels of silk for ——— silk, whereas it was another kind of silk, and that the defendant, knowing this deceit, sold it for ——— silk. Lord Chief Justice *Holt* was of opinion, that the defendant was answerable for the deceit of the factor. If the plaintiff had declared in tort for a breach of the warranty, the declaration would be similar to that in *Hern v. Nichols*. [Lord Chief Justice *Gibbs*.—If you had declared in tort, the *scienter* need not have been proved (b).] Nor is it necessary here to state that the article was sold as saffron, or that the seller undertook that it was so. He, therefore, relied on the authority of the cases cited, and insisted that the plaintiffs were entitled to a verdict.

Lord Chief Justice *GIBBS*.—I do not dispute the authority of any of those cases which have been cited, but they are inapplicable to the present.—This article was sold to the plaintiffs by the name of saffron: they examined it with great minuteness, received it into their custody, kept it six months, and then sold a part of it. Although only three-fourths of it were saffron, still it was fair for the jury to infer, from the inferior price which was given for it, that it was such an article as the plaintiffs intended to purchase; and, under all the circumstances, they were justified in giving their verdict for the defendant.

The rest of the court concurred.

Rule refused (c).

---

(a) 1 *Salk.* 289.—(b) See *Williamson v. Allison*, 2 *E. R.* 446.  
—(c) See *Gardiner v. Gray*, 4 *Camp.* 144.

1817.

}

## BUTTON v. CORDER.

Tuesday,  
April 29.

IS was an action of special *assumpsit*, on a warranty of turnip seed. The first count of the declaration stated, in consideration that the plaintiff would buy of the defendant a quantity of turnip seed, at a certain price *per bushel*, the defendant undertook that the seed was good, which he *could* warrant.—That the plaintiff purchased seed, which was bad and rotten, whereby he was deprived of the benefit of his crop.—There were two other counts warranting the seed to be good.—The case was tried before Mr. Serjt. *Bosanquet* (a), at the last assizes at *Chelmsford*, when the jury found a verdict for the plaintiff.

Mr. Serjt. *Onslow* now moved in arrest of judgment, on the ground that the declaration was insufficient, an absolute warranty having been stated in the first count.

But the court held that the word *could* was sufficient to imply an express and special warranty.

The learned serjeant, therefore, took nothing by his objection.

The plaintiff in declaring on a warranty of seed averred that the defendant undertook that it was good, and which he *could* warrant.—*Held*, a sufficient averment to express an absolute and special warranty.

---

a) Mr. Serjt. *Bosanquet* went this circuit in the room of Lord Chief Baron *Thomson*, lately deceased.

1817.

Tuesday,  
April 29.ARMSTRONG, and others, assignees of NIAS and WHITE,  
bankrupts, v. STRATTON.

An affidavit of debt stated the defendant to be indebted to the plaintiff generally on a bond conditioned for the performance of an award, which award directed one E. F. to pay a sum of money on demand.—

Held, that such affidavit was defective, as it did not appear how the defendant was indebted, and that no demand was expressed to have been made on E. F. for payment.

And the court would not allow a supplemental affidavit.

THE defendant was held to bail on the following affidavit of debt.—*John Winkfield*, of &c., maketh oath and saith, that *Richard Stratton* is justly and truly indebted unto this deponent and to *George Armstrong*, *John Watts*, and *Richard Oliverson*, as assignees of the estate and effects of *Thomas Nias* and *Joseph White*, bankrupts, in the sum of £369 : 9s : 6d. upon and by virtue of a certain writing obligatory, bearing date the 12th of *February*, 1816, and made and entered into by the said *Richard Stratton* to the said *Thomas Nias* and *Joseph White*, in the penal sum of £5000, conditioned for the performance of an award to be made as in the condition of the said writing obligatory is mentioned, and which said award made in pursuance of the said writing obligatory directs one *Thomas Faulding*, his executors or administrators, to pay to the said *Thomas Nias* and *Joseph White*, their executors or administrators, the said sum of £369 : 9s : 6d. on demand: And deponent further saith, that no offer has been made to pay the said sum of £369 : 9s : 6d. or any part thereof, in any note or notes of the Governor and Company of the Bank of *England*, expressed to be payable on demand, as deponent verily believes.

Mr. Serjt. *Copley*, on the first day of this term, had obtained a rule to shew cause why the bail-bond should not be cancelled, and the defendant discharged, upon entering a common appearance, on the ground of insufficiency in the affidavit. He founded his motion on three objections: *First*, that it is stated that the defendant

is indebted to the plaintiffs upon a bond, conditioned for the performance of an award, directing *Faulding* to pay a certain sum to the bankrupts; but it does not appear that any liability upon the bond was attached to the defendant, neither was the condition of the bond set out.—

*Secondly*, it appears by the affidavit, that the award directs *Faulding* to pay on demand, but no demand of payment is stated to have been made on him, nor does it appear that he has not paid the money: *Thirdly*, That the deponent does not negative a tender to the bankrupts, prior to the bankruptcy, as well as to the assignees, since. The rule was granted on the two first objections only.

Mr. Serjt. *Best* now shewed cause against the rule, and insisted that it was quite enough to swear that the debt was due, and shew how it arose, without stating all the particular circumstances; it was therefore sufficient to state that the plaintiffs were entitled to £369 : 9s. : 6d. upon a writing obligatory: although *Faulding* is not the defendant, yet still the defendant is a surety for him, and is therefore liable to the plaintiffs. At all events, he contended that a supplemental affidavit might be allowed, stating the nature of the bond, and that the defendant became surety for *Faulding*, who had refused to pay the money on demand being made, as this would merely explain an ambiguity and not vary the original affidavit, if it should be deemed defective. He relied on the judgment of Lord Chief Justice *Eyre*, in the case of *Jenkins v. Larv* (a).

Mr. Serjt. *Copley* in support of the rule was stopped by the court.

Lord Chief Justice GIBBS.—This affidavit is clearly defective. If a bond be conditioned for the performance of an award, it is not sufficient to state that the defendant

1817.

ARMSTRONG  
v.  
STRATTON.

1817.

ARMSTRONG  
v.  
STRATTON.

is indebted on a bond generally. It is also necessary to shew that a demand had been made on *Faulding* for payment, and that he had refused. With respect to the allowance of a supplemental affidavit, Mr. Justice *Heath* has laid it down, that it is an indulgence which the court should allow sparingly. Following that rule, this is not a case in which a supplemental affidavit should be allowed, as the plaintiffs would have no cause of action, unless payment from *Faulding* had been demanded.

Mr. Justice DALLAS.—The original affidavit being defective, the question is, Whether a supplemental one may be allowed. The practice of the court of *King's Bench* differs from this, and although we are empowered to grant them, still it is an indulgence that ought to be seldom exercised. If supplemental affidavits were frequently allowed, the originals might be drawn with carelessness and laxity.

Mr. Justice PARK.—The practice of the *King's Bench* is certainly preferable. If a supplemental affidavit were to be allowed, the defects in the originals might be always supplied. The discretion of this court is not to admit those affidavits, unless under particular circumstances, and this is a case which does not come under that description.

Mr. Justice BURROUGH concurring,

Rule absolute.

1817.

Doe, on the demise of the GOVERNORS of the HOSPITAL  
of SAINT MARGARET, WESTMINSTER, v. ROE.

Wednesday,  
April 30th.

MR. Serjt. *Onslow* moved for judgment against the casual ejector:—By the several affidavits of the clerk of the attornies and receivers of the rents for the lessors of the plaintiff, it appeared that on the day preceding the essoign day, which was the 19th of *April*, and before the messuage for which this action of ejectment was brought, late in the occupation of *George Goldwire*, deceased, was shut up, and unoccupied; that a copy of a declaration in ejectment was affixed on that day to the street-door, and that there was due from the representatives of *Goldwire* the sum of £81, for two years and a quarter's rent, reserved by an indenture of lease, made between the lessors of the plaintiff and *Goldwire*; that no distress was on the premises on the 18th of *April*, and that the lessors of the plaintiff had power to enter for non-payment of rent. The notice at the bottom of the declaration was addressed to the personal representative or representatives of *George Goldwire*, deceased, and to all and every other person or persons claiming any right or title to the possession of the premises, and required them to appear accordingly.

A notice at the bottom of a declaration in ejectment affixed to the door of an empty house, addressed to the personal representatives of the deceased tenant generally, was held insufficient; as if there had been representatives who had taken possession, they should have been addressed by name; if not, the lessor of the plaintiffs should have proceeded as in the case of a vacant possession.

*Per curiam*.—This is a proceeding under the statute 4 Geo. 2, c. 28, although in the nature of a vacant possession. There is no doubt but that the affixing a copy of the declaration on the door of the premises was sufficient; but the difficulty arises on the fact, whether the notice was properly addressed. It is directed to the personal representative or representatives of the deceased, generally. If

1817.

**DOZ**, on the  
demise of the  
Governors of the  
Hospital of St.  
Margaret,  
Westminster,  
v.  
**ROZ**.

he had a representative, who had taken possession, such representative should have been addressed by name; if there were no personal representative, the lessors of the plaintiff should have proceeded as in the case of a vacant possession.

The learned serjeant therefore took nothing by his motion.

Wednesday,  
April 30th.

**FAIRLIE and others v. CHRISTIE.**

A policy of insurance was effected on goods from *Batavia* to *London*. After the execution of the policy the time of sailing was enlarged from the 10th of *October* to the 31st of *December* by the assureds, and acquiesced in by all the underwriters, except the defendant.—*Held*, that it was a material alteration, although the defendant had signed three memoranda subsequent thereto; yet, not having assented to it, the policy was void as to him, and that consequently the assureds could not recover the amount of his subscription.

THIS was an action brought against the defendant, as an underwriter, for £500, on a policy of insurance effected by the plaintiffs on the 27th of *September*, 1814, in the sum of £10,000, on goods lost or not lost at and from *Batavia*, in the island of *Java*, to *London*, upon any kind of goods and merchandizes, by any ship or ships, sailing on or before the 10th of *October*, 1814.—After the subscription of the policy, by the defendant, he signed three memoranda, specifying the property and vessels declared to be insured, which were dated the 1st and 13th of *December*, 1814, and the 14th *February*, 1815. Previously to the defendant's signing these memoranda the assureds altered, in the margin, the time of sailing, as it originally stood in the body of the policy, from the 10th of *October* to the 31st of *December*, 1814. This alteration was acquiesced in by all the underwriters, except the defendant, by setting their initials opposite such alteration, to indicate their approbation; but the defendant had not subscribed his initials, nor was it proved that he had given any assent to the extended time. The declaration contained counts

on the policy, stating the time as it originally stood in the body of the policy, and the alteration in the margin.—At the trial of this cause before Lord Chief Justice *Gibbs*, at *Guildhall*, at the sittings after last *Trinity* term, the whole of the facts were admitted, except the signature of the defendant to the policy and memoranda, which were proved by the plaintiffs' clerk. It was objected, that the policy was a contract different from that which was signed by the defendant, on account of the alteration in the margin, the 31st of *December* being substituted for the 10th of *October*, 1814. The plaintiffs, however, recovered a verdict.

Mr. Serjt. *Best*, in last *Michaelmas* term, obtained a rule *nisi*, that the verdict should be set aside, and a nonsuit entered, on three points. *First*, whether the contract, being altered without the consent of the defendant, was binding on him; *secondly*, whether it was void by the alteration; and, *thirdly*, whether such alteration did not require a new stamp. The rule was enlarged to this present term; against which the *Solicitor-General* on this day shewed cause, and insisted that the plaintiffs were entitled to recover.—If the policy had been made between two parties only, it would have been avoided; but this is not a joint, but a separate contract, between the assureds and each of several underwriters. The policy, therefore, might be altered as to some of the underwriters, though not as to others. With respect to the warranty of the time of sailing, some might underwrite for one day, and others for another day, as on two distinct policies. If some of the underwriters consent to substitute another day, without altering or defacing the policy, they would be liable. The mere striking through the time of sailing with a pen, and inserting an alteration in the margin, does not vitiate the policy, unless the words were struck out altogether. He relied on the case of *Henfree v.*

1817.  
FAIRLIE  
v.  
CHRISTIE.



1817.

FAIRLIE

v.

CHRISTIE.

*Bromley* (a), where it was held that an award which was altered by the umpire, after his authority had expired, though void for the increased sum directed to be paid, was yet good for the original sum awarded, which still continued legible. The cases of *Hill v. Patten* (b), and *French v. Patten* (c), differed materially from this, as the alteration there was on the subject matter of the insurance, and the court of *King's Bench* therefore decided, that the policy required a new stamp. The alteration of a day cannot apply to the subject matter. The case of *Langhorn v. Cologan* (d) varies from the present, inasmuch as the subject matter was afterwards added in writing, and no value was there declared. Though in this case the alteration of the contract was in progress, still, as to those underwriters who had not assented, it remained in its original state. If the assureds had reason to expect the underwriters would consent to change the day, and altered the policy accordingly, but they afterwards refused, they would be all discharged. This was a manifest intention of all the underwriters to agree to the alteration. It is therefore incumbent on the defendant to shew that the alteration of the time of sailing by some of the underwriters vitiates the contract, such alteration not being completed, and as it does not relate to the subject matter, it is not within the exception of the stat. 35 *Geo. 3, c. 63, s. 13*, which enables the parties to make any alteration in the terms or conditions of a policy, so that the thing insured, which must be taken to mean the same subject matter of insurance, shall remain the property of the same person (e).

Mr. Serjt. *Best*, in support of the rule, was stopped by the court.

---

(a) 6 *E. R.* 309.—(b) 8 *E. R.* 373.—(c) 9 *E. R.* 351.—  
(d) 4 *Taunt.* 330.—(e) See *Kensington v. Inglis*, 8 *E. R.* 373.

Lord Chief Justice GIBBS.—I allow very great weight to the arguments that have been adduced by the *Solicitor-General*, and admit the distinctions he has drawn between this case and those which he has cited, as being against him. The difference between the case of *Hill v. Patten* and the present, is this : There, the plaintiff and defendant agreed to the alteration, and it was held that the plaintiff could not recover without a new stamp. Here, the assureds, without any communication with the assurer, enlarged the time of the ship's sailing. The alteration can only be deemed effective as against those underwriters who consented to it; and cannot, therefore, discharge those who did not; the assureds intending to obtain the signatures of as many of the underwriters as possible, struck out those words, inserted in the body of the policy, and substituted those in the margin. How do they place the assurers not subscribing to such erasure? They leave them without evidence that this was a qualified insurance. When this clause is struck out, the policy stands absolute. The assureds were not empowered to do this : they have entirely altered the policy, and thereby made it on a voyage generally without restriction of time. This is so material an alteration as to vitiate the contract. It is not clear that this was the intention of the parties; and although the assureds might apprehend that all the underwriters would accede to the alteration, still it avoided the policy as against those who did not consent.

Mr. Justice DALLAS.—It is quite clear that if a deed be materially altered by a party interested, such deed is vitiated and avoided. The circumstance of the necessity of applying to the underwriters, shews that the alteration is material. A warranty to sail in a given time is conditional; but if such warranty be struck out, the time of sailing becomes absolute. This therefore is certainly a material alteration in the policy by a party interested.

Mr. Justice PARK.—I am of the same opinion. The

1817.  
FAIRLIE.  
v.  
CHRISTIE.

1817.  
 FAIRLIE  
 v.  
 CHRISTIE.

cases of *Hill v. Patten*, and *French v. Patten*, were determined on the question of stamps; and the court of *King's Bench* held, that the subject matter of the insurance being essentially different from goods, was not within the exception of the statute. This is a proceeding, not as to the necessity of a new stamp, but on the ground that the policy is materially altered, without the consent of the defendant.

Mr. Justice BURROUGH.—I do not entertain the slightest doubt but that this is a material alteration.

Rule absolute.

Friday,  
 May 2d.

Doc d. WEBB v. GOUNDRY.

The plaintiff issued execution in an action of ejectment, after writ of error brought by the defendant, on the ground, that although the defendant had entered into a recognizance, in compliance with the stat. 16 & 17 *Car. 2*, c. 8, he had not given notice of the terms of such recognizance.—But the court, finding that those terms were such as had been invariably used, thought a notice unnecessary; and, consequently, set aside the execution with costs.

Mr. Serjt. *Lens*, on a former day in this term, obtained a rule *nisi*, that the execution in this cause should be set aside, on the ground of a writ of error having been previously brought by the defendant, in an action of ejectment.

April 30th.—Mr. Serjt. *Best* now shewed cause. He stated, that although the writ of error was tested antecedent to the execution, yet the statute of 16 and 17 *Car. 2*, c. 8, s. 3, (a) had not been complied with. The plaintiff,

(a) By which it is enacted, "That no execution shall be stayed in any of his Majesty's courts of record at *Westminster*, or in the courts of record in the counties palatine of *Chester*, *Lancaster*, or *Durham*, or in his Majesty's courts of the great sessions in any of the twelve shires of *Wales*, by writ of error or supersedeas thereupon, after verdict and judgment in any action personal whatsoever, unless a recognizance, with condition according to the stat. 3 *Jac. 1*, shall be first acknowledged in the court where such judgment shall be given. And further, that in writs of error to be brought upon any judgment after verdict in any writ of dower, or in any action of *ejectione firmæ*, in such reasonable sum as the court, to which such writ of error shall be directed, shall think fit, with condition, that if the judgment shall be affirmed, or the writ of error discontinued, in default of the plaintiff or plaintiffs therein, or the said plaintiff or plaintiffs be nonsuited in such writs of error, that then the said plaintiff or plaintiffs shall pay such costs, damages, and sum and sums of money, as shall be awarded upon or after such judgment affirmed, discontinuance, or nonsuit." (Made perpetual by the 22d and 23d *Car. 2*, c. 2.)

in error, had not put in bail, but become bound on his own recognizance, without having given notice of the terms or nature of such recognizance. In order to comply with the provisions of the statute, he should have entered into such a recognizance as the court should direct. It was impossible for the court to form their judgment, as to what extent the recognizance should be taken, without such notice. He cited *Roe d. Fenwick v. Pearson (a)*, where the court made a general rule, that a recognizance should be taken in the value of two years profits, and double costs; contended that this notice was analogous to notice of bail; and that as the recognizance might have been taken in so small a sum as five shillings, the plaintiff in error should have given notice of the terms of such recognizance, in order that the court might exercise their discretion as to its sufficiency.

Lord Chief Justice GIBBS.—Notice of bail is given, in order that the plaintiff may attend and oppose their justification. The notice, in this case, appears to me to be immaterial; at all events, the notice should have been given previous to the recognizance having been taken.—But as it is necessary to enquire the actual practice, let it stand over.

On this day his Lordship observed that no bail in error were put in; but the plaintiff himself entered into recognizance, pursuant to the 16 and 17 *Car. 2, c. 8*, without having given notice of the terms of such recognizance. The question is, whether such notice be necessary. This will depend on the practice of the court, as there is no provision to that effect in the statute. The clerk of the errors has been applied to, who says the invariable practice has been, where no bail have been put in, to take a recognizance in the value of two

1817.

*Doe d. WREB*  
v.  
GOUNDRY.

---

(a) 2 *Barnes*, 1st edit. 86.

1817.  
 Doe d. WEBB  
 v.  
 GOUNDRY,

years rent, and double costs. On being asked how he governed himself, or what discretion he used in cases where no rent had been paid, he answered, that such a circumstance had never occurred during his last twenty years practice; that if it had, he should have applied to the court for his guidance. The recognizance therefore having been entered into on the usual terms, no notice was necessary, and the execution was therefore irregular.

On Mr. Serjt. *Best's* application for costs, the court said, that as the execution had been issued in direct violation to the regular practice of the court, which must always be adhered to, the rule must be

Absolute, with costs.

Monday,  
 May 5.

BAKER v. TOWNSHEND.

Where a court of sessions referred an indictment for an assault to an arbitrator, and empowered him to settle all costs incident to the indictment and subsequent proceedings thereon, *Held*, that such arbitrator did not exceed his authority, by awarding the previous, as well as subsequent costs.

THIS was an action of debt, brought against the defendant for the non-performance of an award. The declaration contained two counts: the *first* stated, that certain differences having arisen between the plaintiff and defendant, by a memorandum of agreement, dated the 27th of *November*, 1816, reciting that the plaintiff did, at the general quarter sessions of the peace, holden at *Stafford*, prefer a bill of indictment against the defendant for an assault, to which the defendant pleaded not guilty, and traversed the same to the following sessions, when the defendant was convicted of the assault, but the judgment of the court was respited until the last

If a party has preferred an indictment for an assault,—*Held*, that he may submit the adjustment of the reparation to arbitration, as well as the costs.

sessions for *Stafford*; and that the defendant claimed title to the possession of a certain piece of land, which was disputed by the plaintiff; and that at the last sessions the plaintiff moved for the judgment of the court for the assault, and offered to give in evidence the circumstances of another assault, alleged to have been subsequently committed upon the plaintiff, and one *J. W.*, in aggravation of the judgment; but it was recommended by the court that the two several assaults, and the disputed right of possession, and all other matters whatsoever in dispute between the parties, should be submitted to the award of *M. A.* It was witnessed, that in pursuance of the recommendation of the court, the plaintiff and defendant engaged to abide by such award, concerning the several assaults, and the disputed right of possession, and all other questions and matters in dispute between the parties; and concerning all costs, charges, and expences *incident to the indictment and subsequent proceedings thereon*, and all other costs, charges, and expences relating thereto. It then stated, that the arbitrator made his award, and ordered the defendant to pay the plaintiff £10, in satisfaction of the assaults so committed by the defendant upon the plaintiff; and the further sum of £50, in satisfaction and discharge of the plaintiff's costs and charges incident to the indictment, *and previous and subsequent proceedings thereon*; and of all other costs, charges, and expences relating thereto. The second count was on an account stated between the plaintiff and defendant.—The defendant demurred generally to the first count, and pleaded *nil debet* to the second. The plaintiff joined in demurrer.

Mr. Serjt. *Vaughan*, in support of the demurrer, raised two grounds of objection to the declaration. *First*, that the arbitrator had exceeded the limits of his authority, as he was not empowered to award costs *previous* to the

1817.  
  
 BAKER  
 v.  
 TOWNSHEND.

1817.  
 {  
 BAKER  
 v.  
 TOWNSHEND.

indictment being preferred; and, *secondly*, that a criminal prosecution could not be made a subject of reference: Had it been the intention of the parties that the arbitrator should have awarded costs on proceedings *previous* to the indictment, the submission might have been left *generally*, without naming the words, either *previous* or *subsequent*. The latter is an operative word in the agreement; and the arbitrator considered it in this light, by introducing the word *previous*, and has therefore exceeded his authority under the submission. If the arbitrator had awarded the £10 for *previous*, and £50 for *subsequent* proceedings incidental to the indictment, the award might be good as to the latter, as being legal, but bad as to the former, as being illegal. The arbitrator not having made this distinction, they cannot be separated; and, therefore, he has exceeded his authority. With respect to the submission being illegal and radically vicious, he insisted that criminal cases could not be referred to arbitration, because they ought to be punished for the common good. He referred to *Bacon's abridgment, tit. Arbitrament (A)*, and contended that a court of sessions could not refer a matter to be determined by another, or delegate their authority. He cited the case of *Rex v. Harding (a)*, and insisted, that as an indictment had been already preferred, the leave of the court ought to have been obtained to sanction a subsequent reference; and it was said in the court of *King's Bench*, in the case of *Rex v. Rant*, and others (*b*), that in every case where parties were allowed, in prosecutions of this kind, to talk together, the whole was under the eye of the court, and their sentence formally followed. He referred to *Mason v. Watkins (c)*, which was an action of debt, on a bond, conditioned for compounding a felony, and held void. That case was not

---

(a) 2 Salk. 477.—(b) E. T. 1797, reported in *Kyd*, on *Awards*, p. 64.—(c) 2 Vent. 109.

particularly applicable to the present; but if an indictment has been preferred, the court cannot delegate their authority, but must give judgment.

Mr. Serjt. *Lens*, *contra*, submitted that the plaintiff was entitled to judgment on both points; and observed, with respect to the first, that the terms of the reference were co-extensive with the authority of the arbitrator, and that he had not superadded or extended the power vested in him; that, as he had not given any costs unconnected with the indictment, he was empowered to award those previous as well as subsequent. He was about to adduce argument on the second objection, but was stopped by the court.

Lord Chief Justice GIBBS.—My brother *Vaughan* has raised two objections to this declaration: *First*, that the arbitrator has exceeded his authority; and, *secondly*, that a criminal matter could not be referred to arbitration. As to the first, the arbitrator has not exceeded his authority, or gone beyond the meaning of the parties who referred the matters in dispute to him. It was their intention that all the expences, incident to the indictment, should be referred. There can be no doubt but that the subsequent proceedings were incident thereto, and the previous expences were incurred by laying the indictment before the grand jury; and although the arbitrator has awarded the previous and subsequent costs, he has still stated them to be incidental to the indictment. As to the next objection, whether the reference was void, on account of the inability of the parties to refer a criminal matter, I perfectly coincide with the cases which have been cited in support of that argument, that the courts must proceed themselves. The court of *King's Bench*, in *Beeley v. Wingfield* (a), which was a case of a public misdemeanor against the defendant, for ill-treating his

1817.  
 {  
 BAKER  
 v.  
 TOWNSHEND.

---

(a) 11 E. R. 46.



1817.  
 ~~~~~  
 BAKER  
 v.  
 TOWNSEND.

parish apprentice, allowed a security for the fair expences of the prosecution, at the recommendation of the court of quarter sessions; and the giving of which security was considered by that court in abatement of the period of imprisonment, to which he would otherwise have been sentenced. That case is stronger than the present, as this was merely for an assault. But there are many cases of a mixed nature, partaking of both civil and criminal. Where a party injured has a remedy by action as well as by indictment, nothing can deter such party from referring the adjustment of the reparation which he is to receive to arbitration, although a criminal prosecution might have been commenced. The parties here submitted to reference disputed assaults, and all other matters in difference between them. The principle to govern my decision is, that all civil matters may be submitted to reference, as well as all costs incident thereto.

Mr. Justice DALLAS.—I am of the same opinion. The term incident, includes previous as well as subsequent proceedings, and all costs and charges thereto would fall under the latter words. The arbitrator has therefore not exceeded his authority; and as to the other point, I entirely concur with my brother *Gibbs*.

Mr. Justice PARK.—I have entertained no doubt but that the arbitrator might have awarded all costs incident to the proceedings. The only hesitation I have felt has been as to the legal question, whether this was a fit subject of reference. The case of *Beeley v. Wingfield*, cited by my brother *Gibbs*, appears stronger than the present.

Mr. Justice BURROUGH.—The assaults were the only legal matters of reference; and it was obvious, from the intention of the parties, that all the costs were to be incidental.

Judgment for the plaintiff, on both grounds (a).

---

(a) See the Cases applicable to the second objection, in *Caldwell on Arbitration*, pp. 4 and 5.

1817.

BYE, plaintiff; HAYWOOD, and others, deforciant.

Tuesday,  
May 6.

MR. Serjt. Copley moved that the præcipe and concord of this fine might be amended, by altering the name of *Hayward* to *Haywood*, conformably to his signature in the writs of covenant and *dedimus*. On his producing an affidavit to shew that this was a mistake (a),

Fine amended by altering the surname of one of the deforciant in the præcipe and concord, conformably to his signature in the covenant and *dedimus*.

Fiat.

---

(a) See *Ex parte Motley and Wife*, 2 B. & P. 455. *Grey v. Wainwright*, 1 Marsh. 578.

MOULF, plaintiff, EYLES and wife, deforciant.

Tuesday,  
May 6.

MR. Serjt. Best moved that a fine, the acknowledgment of which was dated the 12th *February*, 1816, might pass and be levied as a fine of this term, on an affidavit that the parties were all living, and that the delay arose from the attorney's clerk who had absconded (to whose care the documents had been entrusted, and which had only come to hand within a few days) (b).

If the clerk of an attorney, employed to levy a fine, abscond, whereby the papers are mislaid, the court will permit such fine to be afterwards perfected, although the time allowed by rule of court of T. T. 52 G. 3. be exceeded.

Fiat.

---

(b) See *Stone v. Stone*, 4 Taunt. 601. *Linde v. ———*, 5 Taunt. 305.

1817.

Wednesday,  
May 7.*Anonymous.*

The misnomer of a christian name of one of the bail in a recognizance and notice, is fatal.

In a recognizance and notice of bail, one of them was styled *Frances Richards*, instead of *Francis*. The court held this description to be insufficient, and the bail were consequently

Rejected (a).

---

(a) See *Wood v. Chadwick*, 2 Taunt. 172.

---

*In the Exchequer Chamber.*

---

Thursday,  
May 8.

STONE v. MACNAIR.

A declaration in *assumpsit* against husband and wife, on the common money counts, one of which alleged that the husband was indebted for money lent to the wife, at her request, was held bad on writ of error, and the judgment given for the plaintiff,

THIS was an action of *indebitatus assumpsit* on the common money counts, and also for work and labor, and goods sold.—The defendant, below, suffered judgment by default. The damages were assessed generally, on the whole declaration, and the judgment taken accordingly. The 5th count stated that the defendant, below, was indebted for money lent and paid for the defendant's wife, at her request. The defendant, below, having brought a writ of error, assigned for error, among other causes, that below, was reversed. If on a writ of error, one of several counts, in a declaration of *assumpsit*, be bad, and the defendant below suffer judgment by default, and the verdict be entered generally on the whole declaration, such judgment must be reversed.

in the 5th count, the sum of money therein mentioned and in which he was alleged to have been indebted to the plaintiff, and in consideration whereof the promise and undertaking therein mentioned was alleged to have been made, was therein stated and alleged to have been lent and advanced, and paid, laid out and expended, by the plaintiff for the use of the wife of the defendant; and is therein stated to have been lent and advanced, and paid, laid out and expended at the special instance and request of the wife of the defendant; and not at the special instance and request of the defendant; and that it did not appear in the 5th count of the declaration, that the sum of money therein mentioned was lent and advanced, or paid, laid out and expended at the request, instance, and desire of the defendant; and also that it did not appear, in or by the 5th count of the declaration, that there was any legal consideration whatever for the making the promise and undertaking therein mentioned; and that in the 6th and 7th counts of the declaration the supposed work and labor, care, diligence, and materials, and other necessary things in the 6th and 7th counts mentioned, in consideration whereof the promise and undertakings were stated to have been made, were alleged to have been done, performed, and bestowed, and found and provided, used and applied by the plaintiff, for the defendant and his wife, at their special instance and request.

The defendant joined in error.

Mr. *Chitty* for the plaintiff in error, premised, that if he could establish that either of the counts in the declaration were substantially defective, the judgment must be reversed.—Mr. Justice *Buller* held, in the case of *Hancock v. Haywood* (a), that on a writ of error, where one count appears bad, and the verdict is entered gene-

1817.  
  
 STONE  
 v.  
 MACNAIR.

---

(a) 3 T. R. 435.

1817.  
 {  
 STONE  
 V.  
 MACNAIR.

rally on all the counts, the court must reverse the judgment *in toto*, since they cannot discern on which of the counts the damages were given (a).—He stated, that his objection equally affected the 5th, 6th, and 7th counts of the declaration; but that he should confine himself to the 5th only. He observed, that this mode of declaring was objectionable, for the errors above assigned, as no request by the defendant himself is laid, which is essential to establish the validity of that count. Mr. Serjt. *Williams*, in his learned note, in the case of *Osborne v. Rogers* (b), has stated that it has been held that a consideration executed and past is insufficient to maintain an *assumpsit*, unless it were moved by a previous request of the defendant, and so laid in the declaration. He also cited the case of *Hayes v. Warren* (c), and contended, that as the service in this case had been performed, the doctrine there laid down was decisive on this point. With respect to the statement, whether the request of the wife was sufficient, he insisted, from the structure of the count, that it did not appear she was his wife at the time of the supposed contract, and it must be rather intended she was not; and if so, the declaration is decidedly bad; because, in the case of *Mitchinson v. Hewson* (d), it was determined that a husband cannot be sued alone for a debt contracted by his wife before marriage; for it was there observed by the court, that the promise must be co-extensive with the consideration (e). Supposing the money lent to the wife, during the marriage, still the count omits the essential words, *at the request of the defendant*; but, on the contrary, shews that the money was lent without his consent, and at the request of the

---

(a) See also *Onslow v. Horne*, 3 *Wils.* 177.—(b) 1 *Saund.* 264.  
 —(c) 2 *Strange*, 933.—(d) 7 *T. R.* 348.—(e) See *Ran v. Hughes*, 7 *T. R.* 350, n.

wife. If so, the money being lent on the credit of the wife, the husband was not liable. In support of this proposition, he relied on the cases of *Bentley v. Griffin* (a) and *Metcalf v. Shaw* (b). As a married woman therefore cannot contract, it follows, that the whole of the count is invalid. He cited the cases of *Morris and Wife v. Norfolk* (c), *Marshall v. Rutton* (d). He observed, that this case was widely different from *Stephenson v. Hardy* (e); for there it was expressly alleged, that the money was lent to the defendant's wife, in his absence, *at his request*; and the court particularly relied on the latter words; and the same reliance was placed on these words in the case of *Stonehouse v. Bodvil* (f).

1817.  
 قتب  
 STONE  
 v.  
 MACNAIR.

Mr. *Tindal*, *contra*, contended, that after the defendant had allowed judgment to go by default, enough appeared on the face of this declaration to support such judgment. In the 6th and 7th counts, the consideration is stated to have been given for the defendant and his wife, at their request. The promise of the wife avails nothing, for *utile per inutile non vitiatur*. It has been objected to the fifth count, that the defendant's wife was not married to him at the time of the contract; but it is stated that the money is lent to the wife of the defendant, at her request, which is sufficient to shew she was married: He admitted that the action could not be maintained, had the money been advanced to a stranger, as it had been held in the case of *Butcher v. Andrews* (g); that *indebitatus assumpsit* would not lie against B., for money lent to A., at the request of B., because the promise is collateral only. The distinction in this case is, that the money was lent to the wife. If the husband can be sued for a loan of money to his

---

(a) 5 Taunt. 356.—(b) 3 Camp. 22.—(c) 1 Taunt. 212.—  
 (d) 8 T. R. 545.—(e) 3 Wils. 388. S. C. 2. W. Black. 672.—  
 (f) Sir T. Raym. 67.—(g) 1 Salk. 23. S. C. 3 Salk. 15 Comb.  
 473. Carth. 446.

1817,  
 ~~~~~  
 STONE  
 v.  
 MACNAIR.

wife, it is immaterial, whether the declaration state the money to be lent at the request of the wife, or of the husband. He relied on the case of *Stephenson v. Hardy*. The defendant, therefore, having suffered judgment to go by default, has completely waived the objections which have been raised.

Lord Chief Justice GIBBS.—In the case of *Stephenson v. Hardy*, it appears, that money was advanced to the wife, at the request of the husband; but here the money is expressed to be lent at the request of the wife. This case has been ingeniously argued on the fifth count of the declaration, which is evidently bad, and the judgment must be therefore

Reversed (a).

---

(a) Mr. Baron Wood was absent.

---

Friday,  
 May 9th.

JAMES, the younger, demandant; WILLIAMS, tenant;  
 JAMES, spinster, vouchee.

The caption of the warrant of attorney in a recovery may be amended, as it is not an integral part of the instrument.

MR. Serjt. *Bosanquet* moved to amend this recovery, by inserting the word 'pasture,' in the caption of the warrant of attorney. The court, not considering this to be an integral part of the warrant of attorney, acceded to the amendment (a).

---

(a) See *Fox*, demandant; *Benbow*, tenant; *Earl Gower*, vouchee; where the court held that a warrant of attorney could not be altered. 2 *Marsh.* 328.

1817.

WILLIS, demandant; CALVERT, tenant; BARTHOLOMEW  
and WIFE, vouchees.

Friday,  
May 9th.

MR. Serjt. *Vaughan* moved that this recovery, which was suffered in the last *Easter* term, might be amended, by substituting, in the stead of the parish of *Frimley*, (there being no such parish), the words, *The Hamlet of Frimley*, in the parish of *Asb.* It appearing, that the latter description would correspond with the deed to lead the uses,

The court permitted a recovery to be amended by substituting the hamlet of *F.* in the parish of *A.* for the parish of *F.*

The court allowed the amendment.

SPINK v. HITCHCOCK.

Saturday,  
May 10th.

THIS was an action of *indebitatus assumpsit*, for goods sold, and for work, labor, and materials. It was tried before Mr. Justice *Park*, at the second sittings in this term, at *Guildhall*, when the plaintiff obtained a verdict for £10.

Mr. Serjt. *Vaughan* now moved for a rule *nisi*, that the proceedings should be void, pursuant to the stat. 51 Geo. 3, c. 124, s. 1. (a); and that in the mean time

If a defendant be holden to bail on an affidavit for £17 out of which £6 : 10s. : 0d., have been paid, the court will not set aside the proceedings, under the 51 G. 3, c. 124, s. 1; but his remedy, if any, would be under the 43 G. 3, c. 46, for having been maliciously holden to bail.

(a) By which it is enacted, "That where the cause of action in any court shall not amount to the sum of £15, exclusive of any costs, charges, and expenses, that may have been incurred, recovered, or become chargeable, in or about the suing for, or recovering the same, or any part thereof, (except where the cause of such action shall arise, or be maintainable upon, or by virtue of any bill of exchange, or promissory note) no special writ nor any process, specially therein expressing the cause of action, shall be sued forth, or issued from any court, in order to compel any person to appear thereon in such court; and all proceedings and judgments that shall be had, on any such writ or process, shall be, and are thereby declared to be, void, and of no effect."



1817.  
 SPINK  
 v.  
 HITCHCOCK.

all proceedings should be stayed. He grounded his motion on the affidavit of the defendant, and others; who deposed that the plaintiff was indebted in the sum of £200, for rent, and that he had held the defendant to bail for £17, out of which £6: 11s. : 0d. had been paid, and for which the plaintiff had given a receipt. He observed, that this case came strictly, not only within the meaning of the 51 Geo. 3, but also of the 43 Geo. 3, c. 46.

Lord Chief Justice GIBBS.—The facts, disclosed by this affidavit, are not admissible under this application, either to make void or stay the proceedings, within the stat. of 51 G. 3, c. 124, s. 1. This section recites, among other statutes, the 21 of G. 2, c. 3, and the 19 of G. 3, c. 70, which enact, ‘That no person shall be arrested, or holden to special bail, upon process issuing out of an inferior court, where the cause of action shall not amount to the sum of £10, or upwards.’ The same provisions are made in the 43 and 51 G. 3, except that the sum is in those latter statutes extended, from £10, to £15. All these statutes apply to the affidavits only, and not to the sum recovered in the action. The remedy for the defendant, if any, would have been under the 43 G. 3, c. 46, s. 3. (a), for having been maliciously holden to bail, which would have entitled him to costs.

*Per Curiam,*

Rule refused.

---

(a) By which it is enacted, “That if a defendant shall have been arrested, and held to special bail, (without probable cause) in any action, wherein the plaintiff shall not recover the sum for which the defendant was arrested, the defendant shall be entitled to costs, under a rule of court, and the plaintiff be disabled from taking out execution for the sum recovered in such action, unless such sum shall exceed the amount of the taxed costs of the defendant.”

1817.

WILLISON v. PATTESON, and others.

Monday,  
May 12th.

THIS was an action of *assumpsit*, on three bills of exchange, accepted by the defendants, and indorsed to the plaintiff. The declaration also contained counts for money lent, paid, had and received, interest and an account stated; to which the defendants pleaded the general issue of *non-assumpsit*; upon which issue was joined; and, *secondly*, the statute of limitations, to which last plea the plaintiff replied, that at the time the causes of action accrued he was not in this kingdom, but at *Dunkirk*, in *France*, where he continued until the commencement of this suit; and that he did not, during all that time, arrive, or come into this kingdom. Rejoinder thereto, denying that the plaintiff remained and abided out of the kingdom, during the time stated in the replication; upon which issue was also joined. The cause was tried before Lord Chief Justice *Gibbs*, at *Guildhall*, at the sittings after last *Trinity* term, when the jury found a verdict for the plaintiff, damages, £562 : 10s : Qd., subject to the opinion of this court, on the following case:—

In the month of *May*, 1803, the defendants were partners, as merchants, in *London*, under the firm of *Patteson, Lee, and Iselin*, and the holders of one hundred pieces of cambric, the property of *M. Varlet*, of *Dunkirk*, in *France*; who being indebted to *Leger Michelin*, also of *Dunkirk*, assigned his interest in those cambrics to *M Michelin*, of which the defendants had due notice; and *M Michelin*, on the 25th of *November*, 1803, being then resident at *Dunkirk*, drew three bills of exchange on the defendants, at three months after date, payable to his own order, for the several sums of £100, £270, and

If cambric of French manufacture be assigned to merchants in England for sale, and bills of exchange be drawn on them by an alien enemy, resident in France, during war, which they accept,—*Held*, that the drawer having indorsed those bills to a British subject, residing in France, does not enable such British subject to recover on the bills against the acceptors, after the restoration of peace.

1817.  
  
 WILLISON  
 v.  
 PATTERSON.

£130. These bills were duly remitted to the defendants, who accepted them, on the 3d of *January*, 1804, payable as soon as certain cambrics should be sold; which cambrics were afterwards sold, and the produce received by the defendants, on the 7th of *January*, 1804. The bills were indorsed for a valuable consideration by *Michelon*, at *Dunkirk*, to the plaintiff, who is an *English*-born subject; but who then resided, and still continues to reside, at *Dunkirk*. At the time of drawing, accepting, and indorsing these bills, *France* and *England* were in an open state of war with each other, and *Michelon* was then an alien enemy; but before, and at the time of bringing the present action, peace was restored between the two countries.—If the court should be of opinion that the plaintiff was entitled to maintain this action, then the verdict was to stand; but if he should not be so entitled, a nonsuit was to be entered, or this case should be turned into a special verdict, if the court should think proper so to direct.

Mr. Serjt. *Lens*, for the plaintiff, stated that the objections of the defendants, to the plaintiff's recovering in this action, would be founded on his being resident at *Dunkirk* at the time the bills of exchange were drawn; and that *Michelon* could not satisfy the debt, to allow the plaintiff to sue in this country, as no contract with an alien enemy, during war, could be enforced in time of peace: If so broad a principle could be established, every contract made by an Englishman, residing in a country at war with this, would be so far void, as not to enable him either to sue, or recover, in this kingdom. Before the decision of the case of *Potts v. Bell* (a), contracts of indemnity were deemed to be legal; and the determina-

---

(a) 8 T. R. 548.

tions antecedent to that case were recognised by Lord *Mansfield*, in *Gist v. Mason* (a): That case, however, has been over-ruled by the more recent one of *Potts v. Bell*, where the elaborate argument of Sir *John Nicholl* (the *King's Advocate*) satisfied the court of *King's Bench*, that trading with an enemy, without the King's licence, was illegal in *British* subjects. This case is distinguishable from that of *Potts v. Bell*, inasmuch as it does not appear that the origin of the debt between the plaintiff and *Michelon* might have been considered as a matter of trade. In *Antoine v. Morshead* (b), it was held, that where two *British* subjects, *A.* and *B.* were detained prisoners in *France*, and *A.* drew bills payable to *B.* on another *British* subject resident in *England*, which *B.* indorsed to *C.* an alien enemy, on the return of peace *C.* was entitled to recover the amount of the bills from the acceptor. In the case of *Sparenburgh v. Bannatyne* (c), it was held, that a native of a foreign state, in amity with this country, taken in an act of hostility on board an enemy's vessel, and brought to *England* as a prisoner at war, was not disabled from suing, during confinement, on a contract entered into as such prisoner. *Michelon*, being indebted to the plaintiff at *Dunkirk*, paid the debt by those bills of exchange: If, therefore, this payment do not infringe the general established principles of law, the plaintiff would require no further consideration to support his action. Ransom bills were considered legal, as collateral securities, before they were prohibited by statute, and might be deemed similar in point of principle to the bills given in this case. Those who have acted as enemies to this country, though not aliens born, may sue after the expiration of a war, but not during its continuance. He

1813.  
  
*WILLISON*  
*v.*  
*PATTERSON.*

---

(a) 1 *T. R.* 84.—(b) 1 *Marsh.* 558, *S. C.* 6 *Tann.* 237.—  
 (c) 1 *B. & P.* 163.

1817.  
 WILLISON  
 v.  
 PATTERSON.

cited the case of the *Hoop* (a) to shew that an alien is debarred from suing in time of war. The 34 G. 3, c. 9, passed for the purpose of preventing the property of *British* subjects, resident in *France*, being applied for the use of that government, was repealed at the peace of *Amiens*. This case, therefore, must fall within the general principles: *First*, whether all contracts of this description be void; and, *secondly*, whether this contract, by giving an order, payable in this country to an *English* subject, resident abroad, be illegal. During war, there does not appear to have been any trading between the parties; nor was this a commerce against the interest of the state; but merely an engagement between two parties to pay a debt for a valuable consideration. The plaintiff did not carry on any commerce with this kingdom, during the war; but when peace was restored, sought to recover his remedy on those bills, by bringing the present action. Unless, therefore, payments and contracts of every description be put an end to, the plaintiff is entitled to recover.

Mr. Serjt. *Best*, *contra*, observed, that the broad principle of law was laid down by Sir *John Nicholl*, in the case of *Potts v. Bell*; and that, by the law of nations, all contracts, during war, were void and illegal. In the case of *Gist v. Mason*, Lord *Mansfield* did not come to any positive decision. In the two cases, he there cited, from *Rolle's Abriégement*, and Lord *Hardwick's* note, trading with an enemy was held, in one case, to be illegal, and in the other, a misdemeanor: In the case of *Brandon v. Nesbitt* (b), it was determined that no action could be maintained, either by, or in favor of an alien enemy, as the parties were not capable of suing; and in *Bristow*

---

(a) 1 *Robinson's Admiralty Reports*, 196.—(b) 6 *T. R.* 23.

v. *Towers* (a), it was held, that the insurance of an enemy's property was illegal, and that no action could be sustained thereon. A contract of insurance is not distinguishable from a bill of exchange; and as the bills, in this case, were drawn by an alien, the case of *Brandon v. Nesbitt* is applicable. In *McConnell v. Hector* (b), a commission of bankrupt could not be supported, because it was founded on the petition of a party resident in an enemy's country. In *Ex parte Boussmaker* (c), which was an application to prove a debt, under a commission of bankrupt, which had been objected to by the commissioners, on account of the creditors applying to prove, being alien enemies, Lord *Eldon* observed, 'If this had been a debt arising from a contract with an alien enemy, it could not possibly stand, for the contract itself would be void; but if the two nations were at peace, at the date of the contract, from the time of war taking place, the creditor could not sue; but the contract being originally good, on the return of peace, the right would survive.' His lordship did not confine himself to the inability of the parties to sue; but held, that the contract being once void, could not be revived. In the case of the *Hoop*, Sir *William Scott* says, 'a state in which contracts cannot be enforced, is not a state of legal commerce.' If the parties, who are to contract, have no right to compel the performance of such contract, nor even to appear in a court of justice for that purpose, can there be a stronger proof that the law imposes a legal inability to contract? In the case of *Villa v. Dimock* (d), the principle is admitted, that if the cause of action had arisen while the plaintiff was an alien enemy, the action could not have been sustained. The universal rule is, therefore, that, at

1817.

WILLISON  
v.  
PATTERSON.

(a) 6 T. R. 36. — (b) 3 B. & P. 113. — (c) 13 Vesey, jun. 71.  
(d) *Skin.* 370.

1817.  
 WILLISON  
 v.  
 PATTERSON.

the commencement of hostilities, all trade and commerce are put an end to, unless by the express licence of the sovereign. The royal authority was exercised in the course of the last war, and particular subjects were excepted; but even those in a limited degree. The licences themselves shew that all trading must be illegal, unless the sovereign interfere. This is the strongest possible case against the legality of the transaction. The cambrics were sent from *France* to *England*. The money was to be obtained for them, from this country, by bills drawn by *Michelon*, payable to his own order, and indorsed to a *British* subject, then resident abroad. These bills were accepted, payable as soon as such cambrics should be sold. The cambrics were of *French* manufacture; and therefore an encouragement was given to the manufacturers of enemy's property from funds furnished by this country, then in a state of war with *France*. The case of *Sparmburgh v. Bannatyne* confirms the general rule, that an action could not be brought, either by or against an alien enemy. The cases referred to establish the principle, that all trading with an enemy is illegal; and these bills, therefore, having been given for *French* goods, were void. The cases of *Antoine v. Morshead*, and *Daubuz v. Morshead (a)*, were decided on principles wholly inapplicable to the present case, and stood on peculiar circumstances; as the defendant there was a *detenu* in *France*, who drew bills on his son, in *England*, for subsistence, and although such bills were afterwards indorsed to an alien enemy, it was held that such alien was entitled to recover the amount on the return of peace. The defendants, therefore, in this case, are clearly entitled to judgment.

---

(a) 6 *Tqunt.* 332.

Mr. Serjt. *Lens*, in reply.—No distinction can be drawn between this case and those of *Antoine v. Morshead*, and *Daubuz v. Morshead*.—If there had been no contract, during the war, those cases would be destroyed. If an Englishman cannot make a bargain with an alien enemy, to enable the latter to sue, then these cases infringe on the general principle. The case of *Potts v. Bell*, and all those which have been cited, lay down the principle, that trading with an enemy is illegal; but if the plaintiff should not obtain judgment in this case, it will follow that all money transactions will be equally so.—The plaintiff had no knowledge of this transaction between *Michelon* and the defendants. The former indorsed the bills to him for a valuable consideration.—It was necessary for the defendants to shew that the contract was of a prescribed nature. The position contended for need not extend to every species of contract. All the cases cited for the defendants were relative, either to illegal trading, or captures of enemy's property, and the communication with an enemy was the danger dreaded.—Nothing, in this case, can tend to such a supposition, because this was a private dealing between the parties, and not a trading. This is a contract immediately arising from goods previously and illegally sent into this country. Does it therefore follow, that no subsistence of a former debt can be enforced? Unless every species of contract, of this description, be void, the plaintiff is entitled to recover, and the former decisions on this subject will not be infringed on.

Lord Chief Justice GIBBS.—My brother *Lens* has put this case on two grounds. It is fit that the court should not pass by unobserved, difficulties thrown in their way. He has stated truly, that the plaintiff had no direct knowledge of the transaction, with respect to the cambrics.—He has also stated truly, that the plaintiff was ignorant

1817.

WILLISON  
v.  
PATTERSON.



1817.

WILLISON  
v.  
PATTESON.

of the consideration for which the defendants accepted the bills, which having been indorsed to the plaintiff, he was entitled to sue on them. I do not deny the general principles on which my brother *Lens* has endeavoured to establish his case; but I do not consider them applicable to the present question.—My brother *Best* has contended, that all communication with an alien enemy, during war, must be prohibited, as the policy of law thereby secures this state from all dangers to be apprehended from a foreign country; and that, in order to prevent all communication with a foreign enemy, he has insisted, that if subjects of a foreign state draw bills on persons of this country, and seek to enforce payment thereon, the mischief is incurred. He has further insisted, that this was a direct trading. This, however, my brother *Lens* has denied, and contended that the mere drawing or indorsing bills is not such a communication with an enemy, as is contravened by the general policy of law.—It is clear, from the case of *Antoine v. Morshead*, that bills may be indorsed to an alien enemy.—If this principle could have been applied to that case, the plaintiff could not have recovered. This was suggested to the court at the time of the argument. They considered the objection well founded; but thought the particular circumstances of that case took it out of the general principle. It was considered illegal to draw bills, and negotiate them abroad; but in that case, as the defendant was in want of sustenance, it was held, he was not prohibited from so doing; and more particularly, as the bills were drawn on, and accepted by, *British* subjects. The drawing bills in *France* on *England* would not be deemed illegal; but there was the same objection in *Antoine v. Morshead* as in this case, namely, that they were indorsed to an alien enemy. Although the action was brought after the conclusion of the late peace with

*France*, the indorsement was held good: Following the same principle as the court of *King's Bench* have adopted, in the case of *Kensington v. Inglis (a)*, where a certain trading with an alien enemy for specie and goods, to be brought from the enemy's country in his ships into our colonial ports, was licensed by the king's authority; that court held, that an insurance on an enemy's ship, as well as on the specie and goods, put on board for the benefit of *British* subjects, was incidentally legalized.— Upon similar grounds this court determined in *Antoine v. Morshead*, that, as the drawing bills was under peculiar circumstances, the indorsement might be considered as proceeding from the original transaction. The question there was, whether that case ranged itself within those of illegal contracts. The only legal purpose for which those bills were drawn was for the sustenance of *British* subjects, detained in *France*. That decision will not contravene this case, as it was so peculiar in its circumstances, and an exception to the general rule. It is illegal for an alien, in an enemy's country, during war, to draw a bill on a subject resident in this, and then sue him here for the amount of such bill, on the restoration of peace. It gives rise to a communication between subjects of both countries, which ought to be avoided. The drawing and accepting these bills are in themselves illegal. I cannot say that the plaintiff was not ignorant of the whole of the facts attending them. The bills were indorsed to him the day after they were drawn. He was therefore equally affected with the drawer; and, by such indorsement, took all the rights to which such drawer was himself entitled. I therefore most reluctantly conclude that this was an unjust traffic with subjects of an enemy's country, although there is no apparent dishonesty in the transaction.

1817.  
 WILLISON  
 v.  
 PATTERSON.

---

(a) 8 E. R. 273.

1817.  
WILLISON  
v.  
PATTERSON.

Mr. Justice DALLAS.—I may be mistaken in the view I have taken of this subject; but during the whole argument I have experienced no difficulty. It has been broadly established, in the case of *Potts v. Bell*, that all trading with an enemy is illegal. The principle there is not introduced as new law; but is established on a long train of antecedent decisions, and is conformable to the principles laid down in the case of the *Hoop*. If this case can be considered as a trading, the contract is clearly illegal. My brother *Lens* has contended, that this is not a direct trading; but *Potts v. Bell* contains no qualification of trading. Every contract, therefore, is of itself void, *ab initio*. This is the ground on which that case was decided. War puts individuals of every respective government, as well as the governments themselves, into a state of hostility with each other. There is no such thing as a war for arms, or a peace for commerce; and *Vattel*, book 3, cap. 5, sect. 70, establishes this proposition. The trading, in this case, has a reference to a court of justice, and is necessarily contradictory to a state of war. How can it be said, that bills of exchange, drawn by an alien enemy as such, on a subject of this country, during the time of war, are not contracts? Unless, therefore, it can be argued, that the accepting a bill is not a contract to pay money, it does not appear that any doubt can exist. With regard to *Antoine v. Morshead*, this court considered the extreme hardship of *Englishmen*, being detained as prisoners at war; and, therefore, held, that the general rule did not apply to that case. This case, however, comes within the general principles; and the plaintiff is not entitled to recover.

Mr. Justice PARK.—I am of the same opinion. There has been no exception to the general rule, as laid down in the case of *Potts v. Bell*, except in that of *Antoine v. Morshead*.

It has been laid down, by *Bynkershoek*, (an eminent writer on the law of nations), as an universal principle of law, that *ex natura belli, commercia inter hostes cessare, non est dubitandum*.—Although the evidence of trading is not conclusive, it is still a trading. The bills, in the case of *Antoine v. Morshead*, were not drawn for the purposes of commerce, but for the subsistence of *British* prisoners abroad. Here, however, they are negotiated for the purpose of trading.—Though the plaintiff might be ignorant of the circumstances attending these bills, still he receives them from the drawer; and must therefore be fully aware that they were a species of contract, originating with an alien enemy. In the case of *McConnell v. Hector*, Lord *Alvanley* has declared his opinion on the privileges and disabilities of an *English*-born subject, residing in a foreign state; and Lord *Eldon*, in the case of *Ex parte Boussmaker*, has drawn the distinction between contracts with an alien enemy during war and peace. In the case of *Roberts v. Hardy (a)*, it was held, that a debt, due to two partners, was sufficient to support a commission of bankrupt, although one of the partners was resident in an enemy's country; such residence being shewn not to be an adhering to an enemy. On duly considering all the circumstances attending this case, I therefore concur with the decisions of his Lordship and my brother *Dallas*.

Mr. Justice BURROUGH.—The principle adopted in the case of *Antoine v. Morshead*, which stated that case to be an exception to the general rule, admits the existence of the general rule.—It was the object of the drawer, in the present case, who was an alien, to obtain money from the acceptors, who were resident in this country. The drawer having assigned the cambrics to the acceptors

1817.  
WILLISON  
v.  
PATTERSON.

1817.  
  
 WILLISON  
 v.  
 PATTESON.

for sale is entitled to the money arising on the bills. Can it be contended, that if the cambrics had been sold, *Michelon* could have maintained an action for money had and received? If not, he could, by no device, obtain it from this country. If, therefore, the action for money had and received could not be maintained by *Michelon*, being an alien enemy, can he possibly transfer his interest to another, which interest will ultimately revert to his benefit?

Mr. Serjt. *Lens* applied for permission to turn this case into a special verdict, but the court feeling no difficulty on the question refused the application.

Rule absolute for judgment of nonsuit.

Monday,  
 May 12.

LOCK v. CRADDOCK.

An order for a *supersedeas* to discharge a defendant out of custody, on perfecting bail, must be filed with the prothonotary on his signing the writ of *supersedeas*.

MR. Serjt. *Best*, on a former day in this term, obtained a rule *nisi* to set aside the justification of bail and the writ of *supersedeas* in this cause, on the ground of fraud.—He founded his motion on an affidavit which stated that the defendant was arrested for £20,000, and that final judgment for that sum was accordingly signed; that two persons were put in and justified as bail, as for a debt of £20 : 14s., and the motion paper was indorsed to justify in that sum, instead of £20,000. A recognizance was accordingly entered into in the sum of £41 : 8s. The attorney for the plaintiff never received any notice of bail having been put in, or of the justification, although an affidavit of the service of such notice was sworn to, purporting to be made by a person whose residence could not be discovered. Neither did the bail reside at the places as represented in the notice. In the order for the writ of *supersedeas*,

the sum of £20 : 14s., was altered into £20,000. On shewing this order, a writ of *supersedeas* was obtained, and served on the warden of the *Fleet*.—Neither the rule for the allowance of bail, nor the writ of *supersedeas* specify the sum for which bail is put in, but the order for the *supersedeas* does.—The warden of the *Fleet*, on examining the recognizance of bail, found it to be taken only in £41 : 8s.; and, therefore, on discovering this fraud, refused to discharge the defendant.

Lord Chief Justice GIBBS.—It has hitherto been the practice, on sight of an order for a *supersedeas*, which contains the sum for which bail is expressed to be given, for the prothonotary to make out the writ of *supersedeas*, which does not specify that sum, which he delivers to the defendant's attorney, as a warrant for the warden to discharge a prisoner. It is therefore necessary that the prothonotary should be particularly careful in future in receiving orders for a *supersedeas*, which orders should be kept and recorded by him, as they contain information which the *supersedeas* does not.

No cause being shewn, the rule was on this day made  
Absolute.

*N. B.* In consequence of this fraud, the court made a new rule on the last day of this term.

See *Post*.

---

RAW v. ALDERSON.

Tuesday,  
May 13th.

MR. Serjt. *Onslow*, in the course of the last term, obtained a rule *nisi*, to enter up judgment on a joint warrant of attorney against the defendant, as the surviving party.

A judgment on a warrant of attorney may be entered up at the suit of, but not against, a survivor.

1817.

RAW

v.

ALDERSON.

He cited the cases of *Gladwin v. Scott* (a), *Todd v. Todd* (b), and *Futcher v. Smith* (c), and observed that *Gee v. Lane* (d) was at variance with those cases.

Mr. Serjt. *Hullock* now shewed cause, and observed, that the principle of the cases, cited in support of the rule, warrants this conclusion; that if a joint warrant of attorney be at the suit of two persons, and one die, the security not being a mere naked authority, but similar to a joint-bond, would not be defeated by such death.—He remarked, that a bare authority must be strictly pursued, which could not be done in this case; the warrant of attorney being to appear to an action commenced against two, and to receive a declaration against two, which would not authorise the attorney to appear to an action commenced against one; and that, therefore, by the death of one of the defendants, the authority was determined. He stated, that the distinction must be drawn between the parties charging and those charged, and in support of this doctrine he relied on the judgment of Lord *Ellenborough*, in the case of *Fendall v. May* (e), in which his lordship explained the difference between that case and *Gee v. Lane*.

Lord Chief Justice GIBBS.—The court of *King's Bench* have determined, in the case of *Gee v. Lane*, that a joint warrant of attorney given to enter up judgment upon a joint and several bond, will not authorise the entering up judgment against the survivor only.—That court has also decided, in the case of *Fendall v. May*, that they would permit judgment to be entered by the survivors of a warrant of attorney to confess a judgment to three, where one had died. The decision of the latter case, has confirmed the distinction which has been drawn by

---

(a) *Barnes*, 53.—(b) *Barnes*, 48. *S. C.* 1 *Wils.* 312, *Say, Rep.* 8.—(c) 2 *W. Bl.* 1301.—(d) 15 *E. R.* 592.—(e) 2 *M. & S.* 76.

my brother *Hullock*, that a judgment on a warrant of attorney may be entered up at the suit of, but not against a survivor. I perceive the grounds on which this distinction rests. There is a great hardship in entering up judgment against one in a warrant of attorney, where the other is dead. If, in the case of a principal and surety, the latter die, there is a remedy against the former; but during the life of the principal the surety cannot be sued alone.—On the whole, therefore, I do not consider there is a sufficient ground to deviate from the practice of the court of *King's Bench*, and therefore adhere to their decision.

*Per curiam,*

Rule discharged (a).

1817.  
 RAW  
 v.  
 ALDERSON.

---

(a) See the cases collected on this subject in *Tidd's Practice*, 6th edit. p. 576—7.

---

KERVAL v. WILLIAM FOSSETT, and THOMAS FOSSETT.

Tuesday,  
 May 13th.

IT appeared in this case, that the defendants and *Mark Fossett* were indebted to the plaintiff, on a joint and several bond. The plaintiff commenced three several actions of debt thereon. Three writs of *capias* were issued, in one of which the defendants, *William* and *Thomas Fossett*, were named; but the *ac etiam* was against *William* alone. The plaintiff made an affidavit of debt against *William* only, and declared against *William* and *Thomas* separately, and the sheriff arrested both the defendants. Two other writs were issued against

In a bailable *capias* against two defendants, with a clause of *ac etiam* against one, the plaintiff may declare against that one solely, though both have been arrested under the writ; for the *ac etiam* points out the person intended to be proceeded against.



1817.  
 KERVAL  
 v.  
 FOSSETT.

*Mark*, the defendant, and *Thomas Fossett*, separately, on which they were arrested accordingly.

Mr. Serjt. *Best*, on a former day in this term, obtained a rule *nisi*, that the proceedings in this cause should be set aside for irregularity, and an *exoneratur* entered on the bail-piece, on the ground that no separate writ had been issued against the defendant, *William Fossett*.

Mr. Serjt. *Copley* now shewed cause, and contended, that as the *ac etiam* part of the writ was against the defendant, *William Fossett* only, it was a separate writ;—and cited the case of *Forbes v. Phillips* (a), to shew that the mere introduction of the name of *Thomas Fossett* into the *capias*, was no irregularity, as the affidavit to hold to bail was correct, being against *William* only. He insisted, that the declaration was warranted by the writ, and relied on the cases of *Moss v. Birch* (b), and *Spencer v. Scott* (c). Although the court had drawn a distinction in the case of *Stables v. Ashley* (d) betweenailable and notailable process, that case did not apply to the present, because the *ac etiam* was against *William* only: At all events, he insisted that this application was too late, and cited the cases of *Dalton v. Barnes* (e), and *Shawman v. Whalley* (f).

Mr. Serjt. *Best*, *contra*, insisted that he was entitled to his rule on both points. He observed, that the case of *Forbes v. Phillips* was distinguishable from the present, as in that case an affidavit was filed, and only one defendant arrested; but here they were both arrested. He said that in the case of *Spencer v. Scott*, it was determined, that if an ideal person were introduced in a joint writ, the plaintiff may declare against one only; but when both the defendants are real, the declaration must be against them both. This being a case ofailable process, it fell

---

(a) 2 N. R. 98.—(b) 5 T. R. 782.—(c) 1 B. & P. 19.—  
 (d) 1 B. & P. 49.—(e) 1 M. & S. 230.—(f) 6 Taun. 185.

within the rule laid down in *Stables v. Ashley*.—With respect to the application being too late, he observed, that the case of *Dalton v. Barnes*, having been decided in the court of *King's Bench*, was no ground for the guidance of this court, and that *Shawman v. Whalley* was different from the present: the objection there being on a defect in the affidavit to hold to bail; but the affidavit here was void, *ab initio*, and the irregularity cannot be got over.

Lord Chief Justice GIBBS.—I see no grounds to set aside these proceedings.—In the first place, it is difficult to get over the case of *Forbes v. Phillips*; and, secondly, this application is too late, according to the cases of *Dalton v. Barnes*, and *Shawman v. Whalley*. The facts of the case are these: The plaintiff had a cause of action against three defendants, on a joint and several bond. Three separate actions were brought, in which the defendants were held to bail, on three separate affidavits.—In the beginning of one of the writs of *capias* the sheriff is commanded to take the defendants, *William* and *Thomas Fossett*, but the *ac etiam* is against *William* alone. It has been insisted, by my brother *Bert*, that this was a writ against two defendants; and that, therefore, one only could not be arrested on it. I perfectly agree with him; but the name of *Thomas*, in the *capias*, may be substituted for that of *Richard Roe*. In serviceable process, several defendants may be joined, and one only be declared against; but in bailable process no more defendants can be joined in one writ than are intended to be proceeded against. The *ac etiam* is the only operative part of the writ, which points out the person against whom the action is to proceed, and by which judgment is obtained. *Richard Roe* is joined in every writ, but is not declared against. The court cannot distinguish between the name of *Richard Roe*, and any other person.

Mr. Justice DALLAS concurred.

1817.  
KERNAL  
v.  
FOSSETT.

1817.

KERVAL

v.

FOSSETT.

Mr. Justice PARK.—In the case of *Moss v. Birch*, the *actum* was considered the operative part of the writ.

Mr. Justice BURROUGH.—Although two names are usually inserted in the first part of the writ, still the latter, being merely nominal, may be omitted.

Rule discharged, with costs.

Tuesday,  
May 13th.

ROBINSON and another v. YARROW.

The acceptance of a bill of exchange admits merely the drawing, but not the indorsement of the drawer: Therefore, if a bill be drawn and indorsed by procuration; it was held in an action by the indorsees against the acceptor, that as the indorsement by procuration was not proved, they were not entitled to recover.

THIS was an action brought by the plaintiffs, as indorsees, against the defendant, as acceptor of the following bill of exchange:

‘ *London, July 6th, 1816.*

‘ Two months after date, pay to our order, thirty pounds, for value received,

‘ *Per pro Chas. Staeben, & Co.*

‘ *A. Henry.*

‘ To Mr. *John S. Yarrow,*

‘ *17, Broad-street-buildings, London.*’

And indorsed on the back,

‘ *Pr. pro Chas. Staeben & Co., A. Henry, Henry & Co.*’

The *first* count of the declaration stated, that *A. Henry*, using the name, stile, and firm, of *C. Staeben & Co.*, drew the bill on the defendant; and that after his acceptance, he indorsed it to the plaintiffs.—The *second* count stated, that *Henry* drew and indorsed the bill in his own name; and the *third*, that the bill was drawn and indorsed by certain persons, using the name, stile, and firm of *Staeben & Co.*, who indorsed it; but neither of these counts noticed the procuration.

The cause was tried before Mr. Justice *Burrough*, at the

sittings at *Guildhall*, after the last *Hilary* term, when the plaintiffs adduced evidence to prove that the body of the bill of exchange, as well as the indorsement, was of the hand-writing of *Henry*, who was previously a partner with *Staeben & Co.*: but that at the time of drawing the bill, there was no such firm as *Staeben & Co.*; that such a firm had existed, which was dissolved, on the 1st of *January*, 1816; and that after that time, *Henry* carried on business on his own account.—The hand-writing of the defendant, as acceptor, and the due presentment of the bill, were also proved, but no evidence was given of the hand-writing of the indorsement by *Henry*.—On the production of the bill it appeared to have been drawn and indorsed by *Henry*, *per* procuration of *Staeben & Co.* The learned judge thought the plaintiffs ought to prove the procuration, and as they were not prepared with such proof, he accordingly directed a nonsuit.

Mr. Serjt. *Vaughan*, on a former day in this term, obtained a rule *nisi*, that the nonsuit should be set aside, and a new trial granted.

Mr. Serjt. *Best* now shewed cause, and contended, that the decision of the learned judge was perfectly correct, as the bill was improperly set out in the declaration. With respect to the first count of the declaration, the bill is not made payable to the order of *Henry*, but to *Staeben & Co.*—The second count states the bill to be drawn by *Henry*, in his own name; but, it is, in fact, the bill of *Staeben & Co.*, payable to their order, and indorsed by *Henry*, by their procuration.—Although the third count states, that *Staeben & Co.* drew and indorsed the bill, still it cannot be inferred that it was their bill, because the procuration was not proved. As there was no evidence of such procuration, it does not appear that *Staeben & Co.* authorised *Henry*, as their agent, to draw the bill. The indorsement could

1817.  
ROBINSON  
v.  
YARROW.

1817.

ROBINSON  
v.  
YARROW.

only be proved, by shewing that *Henry* was so authorised. The firm of *Staeben & Co.* was extinct when the bill was drawn. Although the defendant accepted it, as drawn by *Henry*, by the procuration of *Staeben & Co.*, still such acceptance does not admit the indorsement, unless it could be shewn, that such indorsement was on the bill at the time of the acceptance. In the two first counts, the indorsement is stated to have been made by *Henry*; and, in the third, by *Staeben & Co.*—The fact was otherwise, as the indorsement was made by *Henry*, by the procuration of *Staeben & Co.*—Although the drawing of the bill be admitted, by the acceptance of the defendant, it does not follow that the indorsement, which is subsequent to such acceptance, must be also admitted. The indorsement by *Henry* was not proved, because it was by the procuration of *Staeben & Co.*; and the last count, therefore, is insufficient, as such procuration was not therein stated.

Mr. Serjt. *Vaughan*, in support of the rule, insisted that the nonsuit should be set aside; and observed, that a party was only bound to declare according to the legal effect of an instrument. This bill, on the face of it, purports to be drawn by *Henry*, by the procuration of *Staeben & Co.* As there was no such firm as *Staeben & Co.* in existence, the legal effect of the bill is, that *Henry*, using the stile of *Staeben & Co.*, drew it.—The defendant, by his acceptance, is precluded from disputing the validity of drawing the bill by *Henry*, as he was aware, at the time the bill was drawn, there was no such firm as *Staeben & Co.* in existence; but that *Henry* drew on his own account.—If an acceptor admit the drawing of the bill by procuration, he admits the indorsement also: It was necessary for the defendant to have shewn, that the authority of *Henry* had ceased; as he recognized the authority of *Henry* to draw, it does

not follow but that he might not also have authority to indorse.—This point should be left for the determination of the jury: Although this was a fraud by *Henry*, it does not appear that the defendant was privy to it. The plaintiffs would, therefore, be without remedy if they could not recover on either of the three counts. He relied on the case of *Bass v. Clive (a)*, where it was held, that a bill drawn, payable to our order, signed in the name of *two persons, & Co.* and accepted by a defendant, might be declared on by the indorsees, as a bill drawn by the aggregate firm; and if it were proved that the firm consisted of one person only, it was still held not to be a variance. He cited the judgment of Lord *Ellenborough*, as being decidedly in point.

Lord Chief Justice GIBBS.—I cannot say whether there has been any private communication between these parties, but can only look to the instrument itself.—*Staeben & Co.* appear to have authorised *Henry* to draw the bill, payable to their order.—The defendant, by his acceptance, admits that such a firm as *Staeben & Co.* was in existence; and, also, that the bill was drawn by *Henry*, by their procuration. By accepting this bill, purporting to be drawn by *Henry*, as the agent for *Staeben & Co.*, the defendant renders himself answerable to them for its amount.—The defendant has, by his acceptance, admitted that *Henry* was authorised to draw the bill by procuration, but he has not admitted thereby that it might be indorsed in this manner; it was not proved that *Henry* was so empowered. The defendant might say, that he had, by his acceptance, admitted the existence of the firm of *Staeben & Co.*, and that the bill was drawn by *Henry* as their agent; but he does not thereby admit that the indorsement was on the

1817.  
ROBINSON  
v.  
YARROW.

---

(a) 4 M. & S. 13.

1817. .  
 ROBINSON  
 v.  
 YARROW.

same terms, and it was therefore necessary that such procuration should be proved.

Mr. Justice DALLAS.—I am of the same opinion.—This is an action, by the indorsees against the acceptor of a bill of exchange, drawn by the procuration and payable to the order of *Staeben & Co.*—I agree, that the defendant, by his acceptance, admits that *Henry* was empowered to draw the bill.—The distinction, however, must be drawn, with respect to the indorsement. It was necessary that the indorsement should be proved; as no evidence was adduced by the plaintiffs that *Henry* was authorised to indorse by the procuration of *Staeben & Co.*, and since the plaintiffs sue in the character of indorsees, they have failed in proof, and the nonsuit is consequently right.

Mr. Justice PARK.—The plaintiffs have not proved that the indorsement was made by procuration; neither have they proved that *Henry* was empowered to indorse by the procuration of *Staeben & Co.*—It has been insisted, by my brother *Vaughan*, that as the defendant acknowledged the authority of *Henry* to draw the bill, by his acceptance of it, he had also acknowledged his power to indorse. In the case of *Smith v. Chester* (a), Mr. Justice Buller has said, that when a bill is presented for acceptance, the acceptor only looks to the hand-writing of the drawer, which he is afterwards precluded from disputing, but he does not thereby admit the indorsements, which may be on the back of the bill at the time of such acceptance. The plaintiffs, therefore, not having proved this indorsement, are not entitled to recover.

Rule discharged (b).

---

(a) 1 T.R. 654.—(b) See *Tatlock v. Harris*, 3 T. R. 174.

1817.

BELL and others v. JUTTING and another.

Tuesday,  
May 13th.

**THIS** was an action for money had and received; and tried before Mr. Justice *Park*, at the sittings at *Guildhall*, after the last term; when it appeared that the plaintiffs, being the owners of a ship, called '*The Lady Hood*,' had ordered a person, by the name of *Brown*, to effect an insurance of £2000 for them, on freight, from the river *Plate* to *Lisbon*, and that *Brown* directed the defendants, who were brokers, to effect such insurance for himself, as the principal, without disclosing the names of the plaintiffs. A loss afterwards happened, and the defendants collected £2000 from the underwriters, and paid over £800, in part of such loss, to *Brown*, without receiving any notice, as to the plaintiff's claim. In that stage of the proceedings, one of the plaintiffs desired the defendants not to pay the remainder to *Brown*, to which they assented; but afterwards paid the residue to him, and resisted the plaintiff's demand, on the ground of such payment.—It was proved, at the trial, that the plaintiffs were the owners of the ship, and that *Brown* had chartered her for the voyage from the river *Plate* to *Lisbon*; and it was shewn, that *M'Donnall*, one of the defendants, had admitted to one of the plaintiffs that he had collected the £2000, and at that time had only paid £800 over to *Brown*, and that he had promised not to pay him the remainder. On these facts, the learned judge was of opinion, that the defendants were liable for the money, which had not been paid over to *Brown*, after they received the notice; and the jury gave a verdict for the plaintiffs accordingly, for £1126, being the balance of the

If a person employed by ship-owners, as their agent, effect a policy of insurance, and represent himself as the principal to the brokers, who cause such insurance to be effected.—*Held*, that if the brokers receive the amount of the loss from the underwriters and pay it over to the agent, they are not liable to the owners, in an action for money had and received, although part of the money was paid to the agent after they were informed of his having acted in that capacity.



1817.  
 BELL  
 v.  
 JUTTING.

insurance, after deducting the £800 paid to *Brown* prior to the notice, together with the premiums, brokerage, &c.

Mr. Serjt. *Best*, on a former day in this term, obtained a rule *nisi*, that this verdict should be set aside, and a new trial granted; on the ground, that no privity was proved to have existed between the plaintiffs, as owners of the ship, and *Brown*, who caused the policy to be effected.

Mr. Serjt. *Copley* now shewed cause, and submitted, that there was no pretence to impeach the verdict which the jury had found for the plaintiffs.—He contended that *Brown* had no interest in the ship, but had merely been employed by the plaintiffs as their agent:—Unless *Brown's* interest could be shewn, the transaction, as to the policy, was fraudulent.—The defendants were apprised of the relative situations of the parties, and should therefore, after the notice given to them, have paid the remainder of the loss to the plaintiffs.—He relied on the case of *Lucena v. Crauford* (a), where it was held, that commissioners, appointed by the crown, were held to have an insurable interest, although the crown might intervene. The same principle was adopted in the case of *Routh v. Thompson* (b). He cited these cases to establish the general principle, that if an insurance be effected by a person supposing himself to be interested, but such insurance was effected on the part of other persons having an interest therein, those persons had a right to claim. There was sufficient evidence in this case, to shew that *Brown* effected the policy, as agent for the plaintiffs. *Brown*, therefore, had no right to claim the amount of the loss from the defendants; and their paying over the money to him, after the notice given by the plaintiffs,

---

(a) 3 B. & P. 265, S. C. 2 N. B. 269.—(b) 13 E. 274.

was fraudulent; for by such payment they recognized that *Brown* acted in the capacity of an agent.—All the facts were considered by the jury; and, as they conceived *Brown* to be merely an agent, they accordingly gave their verdict for the plaintiffs.

Mr. Serjt. *Best*, in support of the rule, was stopped by the court.

Lord Chief Justice GIBBS.—It makes no difference, whether *Brown* had a real or pretended interest in the policy. No evidence has been adduced to prove that *Brown* acted as the agent for the plaintiffs.—No case has been cited to authorise the plaintiffs to enforce the performance of the terms of the policy. The policy was effected by the defendants, who considered *Brown* to be the principal. Whether *Brown* acted from ignorance, or fraud, it still appears that he effected the policy on his own account. The defendants paid the amount of the loss to him, being ignorant that he acted in the capacity of a broker. There is no doubt but that *Brown* was once interested, as the charterer; and it is impossible to say what object he had in view when he effected the policy. If the underwriters had a previous knowledge of the facts, they might have resisted the payment. If not, and after having made such payment, they might recover it back. *Brown* placed himself in the situation of a principal, and considered the plaintiffs as his agents.—He has never agreed that the plaintiffs should be entitled to the benefit of the policy; and therefore they have no right to recover. This case resembles that of *Godin v. The London Assurance Company (a)*. I therefore think that the plaintiffs cannot enforce payment from the defendants against the will of *Brown*, as there is no evidence to shew that he acted as their agent.

1817.  
BELL  
v.  
JUTTING.

---

(a) 1 Burr. 489.

1817.  
 {  
 BELL  
 v.  
 JUTTING.

Mr. Justice PARK.—At the trial, I thought that the plaintiffs had a right to recover; but, on a more deliberate consideration of the case, I am of opinion, that the evidence adduced was not sufficient to entitle them so to do. I considered *Brown* in the light of an agent for the plaintiffs; but I now perceive that he was not so, since the policy was effected on his own account, and not for the plaintiffs. I carried the doctrine of *ratione habitio* further. In the cases of *Lucena v. Crauford*, and *Routh v. Thompson*, the persons effected the insurance for the benefit of the crown, who were entitled to recover.

Mr. Justice DALLAS and Mr. Justice BURROUGH assenting,

Rule absolute (a).

---

<sup>a</sup> See *Routh v. Thompson*, 11 E. 428, *Mann v. Forrester*, 4 Camp. 60, *Westward v. Bell*, 4 Camp. 349.

---

Tuesday,  
 May 13th.

EVERTH and another v. BELL.

In an action to recover a subscription from an underwriter on a policy of insurance, if the declaration state the vessel to be stranded, bulged, damaged, and wrecked, and money be paid into court generally by the defendant thereon.—*Held*, that such payment could not be applied by the plaintiff, who offered the rule of court as evidence of the loss, as an admission of a stranding only, as such payment might apply to any other loss.

THIS was an action brought to recover the defendant's subscription of £200, for a total loss on a policy of insurance, effected on fish, by the ship *Success* from *London* to *St. Petersburg*, warranted free from average, unless general, or the ship should be stranded.—The cause came on for trial at the sittings after the last term, before Mr. Justice PARK, at *Guildhall*. The declaration stated that the ship sailed with goods on board thereof, and that she was lost by being stranded, bulged, damaged, and wrecked. The defendant paid money into court generally on the

whole declaration. There was evidence adduced of a general average. A verdict was taken generally for the plaintiffs, subject to the opinion of this court, whether the stranding was admitted by the defendant's paying money into court. As the plaintiffs adduced no evidence to prove that fact, and the jury having found specially, that there was neither a total loss, nor a stranding, unless by the rule of court :

Mr. Serjt. *Lens*, on a former day in this term, obtained a rule *nisi*, that this verdict should be set aside and a nonsuit entered, or that a verdict should be entered for the defendant.

Mr. Serjt. *Best*, and Mr. Serjt. *Vaughan*, now shewed cause, and submitted that the payment of money into court amounted to an admission of the stranding. The declaration on the policy states that the ship was stranded, bulged, damaged, and wrecked. The money, therefore, having been paid generally, admits all that was stated on the face of the declaration. It was not necessary that the term stranding should have been inserted in the declaration. It has been held, that the paying money generally into court, in an action on a bill of exchange, dispensed with the necessity of proving the hand-writing of the drawer, *Gutteridge v. Smith (a)*.—The cause of the loss is the stranding, which is admitted by the payment into court, but the amount of such loss is not thereby also admitted. The same principles apply to policies of insurance, as to every other species of contract.—If the defendant had not pleaded, every thing but the damage would be admitted in the declaration. The plaintiffs, therefore, were not required to prove stranding, where money had been paid into court. This declaration is particularly adapted to

1817.  
EVERTH  
v.  
BELL.

---

(a) 2 H. Bl. 274.

1817.  
 EVERTH  
 v.  
 BELL.

stranding. Had it been confined to stranding only, such stranding would certainly have been admitted. The words, bulged, damaged, and wrecked, might have arisen from the effect of the ship's being stranded.

Mr. Serjt. *Lens*, in support of the rule, was stopped by the court.

Lord Chief Justice GIBBS.—The law has been correctly stated by my brothers *Best* and *Vaughan*. If the loss had arisen from any other cause than the stranding, the payment of money into court might apply to such other loss, and therefore the admission is not confined exclusively to the stranding. The declaration states that the ship was damaged by all possible means, one of which was stranding; but the payment of money into court did not admit that the loss arose by stranding only.

*Per curiam*,

Rule absolute for a nonsuit (a).

---

(a) *Vide* the case of *Bennett v. Francis*, 2 B. & P. 530, where the doctrine relative to the payment of money into court is fully explained.

---

Tuesday,  
 May 13th.

ABBOTT v. ABBOTT.

If a defendant undertake to accept short notice of trial for the sittings after term, such notice cannot be considered to extend to the adjourned sittings.

Mr. Serjt. *Pell* on a former day in this term had obtained a rule *nisi* for judgment as in case of a nonsuit for not proceeding to trial, pursuant to notice.

Mr. Serjt. *Best* now shewed cause on an affidavit, which stated that although the defendant had obtained time to plead on the terms of accepting short notice of trial for the sittings after term, under an order; yet, when that

order was obtained, only one day remained before the sittings. He therefore contended that the order could not require the defendant to accept notice of trial at the adjourned sittings.

Lord Chief Justice GIBBS.—If the facts disclosed by this affidavit be true, the rule must be discharged, as a notice, for the adjourned sittings does not satisfy the terms of the order. The parties should see that those orders are properly expressed, and as one day only remained before the sittings, the defendant might consider that the cause would not be then tried.

*Per curiam.*

Rule discharged.

1817.

ABBOTT.  
v.  
ABBOTT.

TAYLOR v. HOOMAN.

Wednesday,  
May 14th.

THIS was an action of trespass for breaking and entering the plaintiff's house, and demolishing his furniture, tried before Lord Chief Justice Gibbs, at Westminster, at the sittings in this term.—The declaration contained several counts, all of which stated the trespasses to have been committed in the parish of Clerkenwell, in the county of Middlesex. It was proved on behalf of the defendant, that Clerkenwell consisted of two parishes, the one called Saint John, the other Saint James; that a rector officiated at the former, and that a curate was appointed by the parishioners to serve the latter, although both parishes were generally known by the name of Clerkenwell.—His lordship held that Clerkenwell was an improper description in the declaration, and directed a nonsuit.

In a declaration of trespass for breaking and entering a house, the premises were laid in the parish of Clerkenwell. It was proved that Clerkenwell consisted of two parishes or districts, though it was generally known by the name of Saint James, Clerkenwell.—Held, an insufficient description.

1817.  
 TAYLOR  
 v.  
 HOOMAN.

Mr. Serjt. *Best* now moved for a rule *nisi*, that the nonsuit might be set aside, and a new trial granted; observing, that there was, in fact, only one parish, known by the name of *Saint James Clerkenwell*, and he referred to the statutes 15 *Geo. 3. c. 23. (a)*, and 17 *Geo. 3. c. 63. (b)*, in which it was so described. He produced affidavits of one of the parishioners, the superintendant of the parochial department, and the vestry clerk, who deposed that they had known the parish and its boundaries several years, and that there was only one general and distinct parish, commonly called *Clerkenwell*, which was particularly distinguished by the name of *Saint James, Clerkenwell*. That *Saint John's* was merely a district, which, although it had a chapel, dedicated to that saint, was altogether under the control of *Saint James's*, except as to the paving and lighting acts.

Lord Chief Justice GIBBS.—It was proved at the trial, that there were two parishes in *Clerkenwell*, the one known by the name of *Saint John*, the other by that of *Saint James*. *Clerkenwell*, therefore, is not a sufficient description. The acts of 15 *Geo. 3, c. 23*, and 17 *Geo. 3, c. 63*, do not form a part of the public statutes.

The court, however, granted the rule, and permitted the plaintiff to amend his declaration, by adding a count on payment of costs.

---

(a) Entitled "an act for building a workhouse, and for the better relief and employment of the poor within the parish of *Saint James, Clerkenwell*, in the county of *Middlesex*."

(b) Which was an act to explain and amend an act, made in the 14th year of the reign of his present majesty, entitled "An act for paving, repairing, lighting, and watching, the streets and other public passages and places within that part of the parish of *Clerkenwell* called *Saint James's*, and removing obstructions and annoyances therein," &c.

SCHRODER and another v. THOMPSON.


Friday,  
May 16th.

THIS was an action to recover £200, as a total loss on a policy of insurance, effected by the plaintiffs on the 25th of *November*, 1807, and underwritten by the defendant, on the ship *Bremer*, valued at £2000, on a voyage from *London* to her loading port in *Virginia*, and back. The cause was tried before Mr. Justice *Dallas*, at *Guildhall*, at the sittings after last term, when it appeared in evidence, that the *Bremer* arrived at the port of *Norfolk*, in *Virginia*, with a cargo of salt, in the month of *January*, 1808, at which time an embargo was laid on all shipping in the ports of *America*: that she remained in the same port, after discharging her cargo, until *August*, 1809, and then sailed from thence, laden with timber, bound for *London*, but has not since been heard of. It further appeared that the *Bremer* had sailed from *London* under a charter-party, whereby the captain covenanted to proceed to the port of *Norfolk*, and there to take in a cargo of timber, and return therewith to *London*.—Evidence was also given, that the ship continued at *Norfolk*, after the embargo was taken off, which was in *March*, 1809, until the month of *August* following, and which, on the part of the defendant, was contended as most unreasonable, and amounted to a deviation: but the jury, under the direction of the learned judge, found the contrary, by giving the plaintiffs a verdict for £200. His Lordship, however, reserved the two following points: *First*, whether on the *Bremer's* arrival at the port of *Norfolk*, she had not the power, with reference to the *American* embargo act, of immediately departing from

A policy was effected on a ship from *London* to her loading port in *Virginia*, and back. On her arrival at that port, in *January* 1808, an embargo was laid on all shipping in *American* ports, by an act of Congress, which contained a proviso, that all foreign ships, either in ballast, or with goods on board, might depart when notified of that act. The captain had covenanted by charter-party to take in a cargo of timber at that port, and return therewith to *London*.—It was proved that the embargo was taken off in *March*, 1809, and that the ship did not sail until the *August* following; and that she was lost on her voyage home.—*Held*, that the captain was justified in remaining in port, and that he was not bound to return with her

cargo, or sail in ballast, and that consequently the underwriters on the ship were liable at the time of the loss.



1817.  
  
 SCHRODER  
 v.  
 THOMPSON.

that port with her cargo of salt, and ought not to have availed herself of it; and, *Secondly*, assuming that she had not that power, whether after discharging her cargo of salt at *Norfolk*, she might not have left that port in ballast, pending the embargo.

Mr. Serjt. *Lens*, on a former day in this term, obtained a rule *nisi*, that this verdict might be set aside and a non-suit entered, or a new trial granted.

The *Attorney-General* (a) and Mr. Serjt. *Best*, on a subsequent day shewed cause, and observed, with respect to the first question, it had not been proved at the trial, that the captain had that notice of the embargo before he entered the port, which they contended was absolutely necessary. The principal point depended upon the construction of the *American Embargo Act*, and whether the captain having entered the port of *Norfolk*, could leave it under the proviso contained in the first section of that act (b). It does not appear that such proviso extended to all foreign ships entering into *American* ports during the embargo, but to such only as were in port before or at the time the embargo was laid on. The words 'cleared or not cleared' in the former part of the section can evidently apply only to those ships then in port. The obvious construction of the act was to

---

(a) The *Solicitor-General*, Mr. Serjt. *Shepherd*, was promoted this office on the 7th of *May*.

(b) By which it was enacted, by the senate and house of representatives of the United States of *America*, in Congress assembled, on the 22d of *Dec.* 1807, 'that an embargo should be, and thereby was laid on all ships and vessels in the ports and places within the limits and jurisdictions of the United States, cleared or not cleared, bound to any foreign port or place, and that no clearance should be furnished to any ship or vessel bound to such foreign port or place, except vessels under the immediate direction of the president of the United States; and that the president was authorized to give such instructions to the officers of the revenue, and of the navy and revenue cutters of the United States, as should appear best adapted for carrying the same into full effect, *Provided* that nothing therein contained should be construed to prevent the departure of any foreign ship or vessel, either in ballast, or with the goods, wares and merchandizes on board of such foreign ship or vessel, when notified of that act.'

lay an embargo on all ships then, or which should thereafter arrive in port, but by the terms of the proviso those foreign ships only which were then in port, either in ballast or with goods on board, might depart on receiving notification of the act; all foreign ships which might thereafter arrive must either be in ballast, or have goods on board; but this act could not extend to those ships, for the words '*when notified*' mean, when the act should be fully promulgated to the foreign ships then in port; but no goods were afterwards to be taken on board, those ships, but on receiving information of the embargo, they were permitted immediately to depart. The captain therefore was embarrassed, because he arrived in port after the embargo was imposed. The case would have been otherwise, had he been there at the time, but having arrived, he had a right to exercise his own prudence and discretion, and to act according to the best of his judgment, as if the policy had not been effected. If foreign ships, in port, were half laden, they were bound to depart in that state, and it is impossible to contend that those ships which might afterwards arrive were not liable to detention. By the usage of war, if a ship enter a port, after an embargo has taken place, such ship is liable to be detained; and, therefore, all the indulgences intended to be granted by the *American* government, extended only to those foreign ships which had already arrived and were then in port. The proviso cannot apply further than is expressed in its own terms, which were reconciled by general rules of law and usage. Had the captain left the port in ballast, after having disposed of the salt, and not taken in a cargo of timber, his employers might have had just ground of complaint; if the embargo had been confined to one port only, the case might be different; but here it extended to all the ports of the United States. It should therefore have been shewn at the trial, that the captain was at liberty to discharge the cargo of salt, and sail in ballast for *London*;

1817.

SCHRODER  
v.  
THOMPSON.

1817.  
 SCHRODER  
 v.  
 THOMPSON.

but that would be contrary to the terms of his charter-party. This, however, does not only depend upon the strict construction of the embargo act, but also whether there has been an unnecessary or unreasonable delay on the part of the captain. It does not appear that the captain could possibly have sailed sooner than he did, as, after the embargo was taken off, and he had received his cargo of timber, he quitted the *American* port.—Neither fraud nor delay can be imputed to him, as the proviso in the embargo act did not extend to the *Bremer*, as she arrived after the embargo was laid on, and the captain not considering himself justified in proceeding on his voyage in ballast, was warranted in remaining in port until he had received his cargo of timber, and as the jury had found that no unreasonable delay could be imputed to him, the plaintiffs were entitled to recover.

Mr. Serjt. *Lens* and Mr. Serjt. *Vaughan*, *contra*, insisted that at all events there was an improper delay on the part of the captain, as the embargo was taken off in the month of *March*, and he remained at *Norfolk* until the month of *Aug.* 1809.—[Mr. Justice *Dallas*. It was given in evidence, that the *Bremer* sailed from that port as soon as possible.] [Lord Chief Justice *Gibbs*.—The rule was granted on the ground that the ship entered the port unlawfully, as she was not bound to enter at all; or, that having so done, she might have unloaded her cargo and immediately have left the port in ballast.] Still the underwriters are discharged, as they subscribed the policy on the ship only. Had they underwritten on the cargo, it would have been a very material distinction. But the captain was not justified in remaining so long. If the objects of the embargo act were to contradistinguish foreign ships in harbour from those that were not, words to that effect would have been introduced; but the proviso applies equally to both, and the words ‘*when unladen*,’ relate merely to the latter part of the sentence,

and do not override the whole of it. Any vessel, either in ballast, or half laden, might depart on receiving notice of the act. The *Bremer* had an option, either to have gone into port or not. But, having entered, she had the same privileges as other vessels which were there before the embargo took place. On receiving notice of the act she might have immediately departed. With respect to the question whether, having entered the port, she might not unload her cargo, and quit it in ballast, pending the embargo, so as to effect the intended purposes of the voyage, they contended that she might have done so at any time. If there had been a general and unqualified embargo, and the captain had acted in ignorance, the ship might have been detained; but by the terms of the proviso the indulgence of the *American* government extended to all foreign vessels entering their ports, as well as to those which were there at the time the act passed. Though the captain had a right to exercise his own discretion, still he should not have gone into port, or if he had so done, he should have delivered his cargo and sailed in ballast. No restraint was imposed on the vessel. The embargo act merely amounted to prohibiting the export of goods laden on board any foreign vessel to any foreign port. All ships, whether laden or in ballast, might depart on notification of the act. The underwriters could only remain liable as long as the embargo continued. The subsequent delay of the captain was unwarrantable, and as the ship was not liable to detention, nor the defendant interested in the cargo, but merely in the ship, he could not be considered liable to the plaintiffs in this action.

Lord Chief Justice GIBBS.—What should the captain have done? Should he have returned with the cargo of salt, without entering the port, or should he have delivered such cargo and taken in ballast, and having taken

1817.

SCHRODER

v.

THOMPSON.

1817.  
 SCHRODER  
 v.  
 THOMPSON

in ballast, should he have returned therewith to *London*, or where should he have gone?

*Cur. adv. vult.*

On this day his Lordship delivered the following judgment.—The court have looked into this case with a considerable degree of attention. On mature deliberation, they think there is no ground for disturbing the verdict found by the jury; but are clearly of opinion that the ship was entitled to arrive at *London*, at the risk of the underwriters, and that the insurers were protected by the policy at the time the loss happened.

Rule discharged.

Friday,  
 May 16.

WILLIAMS v. MARSHALL.

Unless a vessel receive her clearing note, and other necessary documents from the proper officer at *Gravesend*, it is not such an exportation of the goods, as will protect the cargo, although she left the port of *London*, and observed the usual formalities of clearing at the custom-house there. A licence, therefore, for exportation to an hostile port remaining in force till the 10th of *September*, was not complied with by clearing from the custom-house, on the 9th, and receiving a cocket at *Gravesend*, on the 12th of *September*, although the vessel met with an accident; and the insurance was in consequence held void.

THIS was an action on a policy of insurance, dated the 5th of *August*, 1809, at and from *London* to *Amsterdam*, on hides, by the ship *Constantia*, including all risks, till they were deposited in the warehouses of the consignees. The ship was captured.—The cause was tried before Lord Chief Justice *Gibbs*, at *Guildhall*, at the sittings after *Trinity* term, 1815; when it appeared that a licence, dated the 11th of *August*, 1809, had been obtained for the voyage from the principal secretary of state, to remain in force for the export of the cargo, until the 10th of *September* following, and for the vessel to return in ballast till the 1st of *October*. The ship was loaded and cleared from the custom-house on the 9th of *September*; but did not receive her clearing note and other docu-

ments at *Gravesend*, until the 12th. An officer of the custom-house, called a searcher, said that it was his duty to go on board vessels at *Gravesend* and deliver the cockets and clearing note, and that until such documents were delivered, the merchant could not obtain the drawback, to which he might be entitled, and that the custom-house would not grant such drawback, if the ship were lost before she arrived at *Gravesend*, without an order from the treasury. The question was, whether the ship had sailed according to the terms of the licence, which expired on the 10th of *September*, as she did not arrive at *Gravesend* until the 12th, although she had cleared the custom-house, at *London*, on the 9th.—A verdict was found for the plaintiff, this point being reserved by his lordship for the consideration of the court.—A rule *nisi* having been obtained by Mr. Serjt. *Lens*, in *Michaelmas* term, 1815, that this verdict should be set aside, and a new trial granted; the *Solicitor-General* and Mr. Serjt. *Best* shewed cause in the same term, when the court made the rule absolute on the defendant's admitting the policy, as stated in the declaration (a). The cause was again tried before Lord Chief Justice *Gibbs*, at *Guildhall*, at the sittings after last *Trinity* term, when it was further proved that the ship broke her bowsprit in passing down the river, and that she was in consequence detained a whole day in repairing it, and that had it not been for that accident she might have reached *Gravesend*, on the day the licence expired. The jury, under the direction of his Lordship, found a verdict for the defendant, on the ground that the license had, in fact, expired before the vessel left *Gravesend*, as merely leaving the port of *London*, and clearing at the custom-house, did not amount to an exportation, and that consequently she had not departed, under the protection of such licence.—In

1817.  
WILLIAMS  
v.  
MARSHALL.

(a) See this case reported ? *Marsh.* 92. *S. C. 6. Taunt.* 390.

1817.

WILLIAMS  
v.  
MARSHALL.

*Michaelmas* term last, a rule *nisi* (a) for a new trial was again granted, as it was insisted that there was a misunderstanding with respect to the effect of the clearance, and that the assured were entitled to the benefit of the licence at the time of the ship's sailing.

Mr. Serjt. *Lens*, Mr. Serjt. *Vaughan*, and Mr. Serjt. *Copley*, for the defendant, on a former day in this term shewed cause, observed, that the same arguments which were adduced in this case in *Michaelmas* term, 1815, were applicable to the present. The plaintiff now applied for a new trial, conceiving that he could satisfy the court that the true construction of the licence was the time of leaving the port of *London*; and that it was immaterial, whether or not the licence expired before her departure from *Gravesend*.—[Lord Chief Justice *Gibbs*.—The present rule was granted on the ground that the court had misconceived the circumstance, that the ship had not completely sailed until she had left *Gravesend*.] Although, for some purposes, the leaving the port of *London* might be deemed a commencement of the voyage; yet, as all the parties were resident there, and the licence was granted to a person who knew all the circumstances attending the time of the vessel's sailing; it was his duty to have procured another licence, in case the time limited by the former had expired. A vessel cannot sail on her voyage without stopping at *Gravesend*. The leaving *London*, therefore, is merely a preliminary step to be taken by a vessel on her outward bound voyage, and she is not at liberty to proceed on such voyage until she has touched at *Gravesend*, and received her clearance for exportation. The captain's last clearance is given at *Gravesend*, which is termed a cocket.—Can a vessel sail without such an instrument? If not, can she be said to have left this kingdom with the

(a) This rule was opened in consequence of a case in the *Admiralty* having been cited, in *Tulloch v. Boyd* (next case) in which Sir *Wm Scott* was said to have decided that a ship sailing under similar circumstances was protected by the licence.

sanction of the government? It was necessary that this vessel should have a licence, because she was going to a hostile port in time of war. But this licence had expired two days before the last clearance was delivered by the proper officer, whose duty it was to see that she commenced her voyage according to the terms of the licence. —Can it therefore be contended that she could sail in defiance of these regulations? [Lord Chief Justice *Gibbs*.—Although all the acts of parliament speak of a clearance, being delivered to a vessel, there is in fact no such thing. The truth is, that the government do not entrust the captain of a ship with the custody of the documents necessary for his departure, till he arrive at the last point within their control. They send those documents themselves to the officers at that point, and the ship cannot sail without, but must call for them; the delivery of which to the master or captain is considered as the clearance.] The plaintiff contends that this clearance merely deprives him of his drawback; but it is, in fact, a control kept over the sailing of vessels, till every thing requisite be done. The cocket is the delivery-note of all the necessary documents for the ship's sailing, and she cannot legally leave the kingdom without it. Putting the most liberal construction on this licence, there had been neither a literal or substantial compliance with it, for the rule respecting the relaxation of licences has only been in cases of accident or misfortune. The government would, on application, either have granted an extension of it, or a new one; but if such application was not made, the licence was altogether void and ineffective. The case of the *Attorney-General v. Poughet (a)*, which depended on a question as to the payment of duties on a quantity of hides, is in point, although it may be distinguishable from the present, as

1817.  
  
 WILLIAMS  
 v.  
 MARSHALL.

---

(a) 2 Price's Exch. Rep. 381.



1817.  
 ~~~~~  
 WILLIAMS  
 v.  
 MARSHALL.

it turned on what should be deemed an exportation from this country; and Mr. Baron *Wood* there held, that goods shipped could not be considered as exported, until the ship had cleared the limits of the ports. It therefore shews, that exporting does not mean the mere leaving the port *London*; but that the exportation could not commence until the vessel had left the dominions of *Great Britain*. [Lord Chief Justice *Gibbs*.—Is not this strictly a question to exportation, as the licence, by the terms of it, was to remain in force for the export of the cargo, till the 10th of *September*?]—Although the ship, in the case, the *Attorney-General v. Poughet*, had obtained her clearance, and was in a condition to depart; yet, in this case every thing required was not done. The legality of the voyage depended not only on the licence at the commencement, but on the subsequent documents which qualified the vessel to proceed. This case, therefore, is divided into two points: *First*, whether this be an exportation within the terms of the licence. It certainly cannot be so considered; and, *Secondly*, if it be not an exportation, is the plaintiff entitled to extend the term originally granted to him by the licence to export? No reason can be assigned for his being so entitled, as the government would have granted him extension, on application, if they had the only competent authority so to do. On these grounds, therefore, the transaction is illegal, and the rule cannot be supported.

The *Attorney-General*, and Mr. Serjt. *Best*, *contra*, submitted, that the plaintiff was entitled to a new trial. The defendant distinguished this case from that of the *Attorney-General v. Poughet*, as the facts of that case came on upon demurrer, and the court could neither add to, nor diminish the facts. The judgment, therefore, was given on the specific facts stated on the record, and not on general principles. In that case, the hides were in such a state as to be subject to duty, on being exported. There is a wide distinction

between clearing goods and clearing a ship. The hides were merely entered at the custom-house to be shipped, and the vessel had not left the port of *London*. That therefore could not amount to an exportation, unless the mere entry of the goods, and the payment of the duty and shipment of them, could be deemed sufficient for that purpose. If it had been stated that the ship had taken in the hides, and cleared at the custom-house, there would have been no demurrer. That case, therefore, materially differs from the present; for in this, every thing was done both at *London*, and at the custom-house, which could be effected. It is true, that at the time the licence expired, the ship had not received the cocket, which ought to have been delivered at *Gravesend*. What is the effect of this document? Until it be produced, the merchant is not entitled to the drawback, and it is therefore merely to protect the revenue from fraud. If the loss had taken place between *London* and *Gravesend*, the case would be different. When the vessel left *London*, she was exported for all necessary purposes; and from that moment must be considered to have commenced her exportation, although she had not got that paper, and the licence had not then expired. Ships which pass in ballast receive no cocket at *Gravesend*, and no drawback is allowed, unless they have passed that place. Whether the government have a right to limit the time of exportation by licences of this description; if such licence be construed strictly, it would be necessary to have an exact compliance with every licence as well as to exportation as importation. In the case of *Effurth v. Smith (a)*, the vessel was protected, although the licence had expired long before she commenced her voyage. It must therefore be inferred, that the exportation, in this case, had begun within the terms of this licence, as every thing possible

1817.

WILLIAMS  
v.  
MARSHALL.

---

(a) 5 *Tam.* 399.

1817.  
 WILLIAMS  
 v.  
 MARSHALL.

was done by the plaintiff, to entitle him to export.— Even could the vessel be considered to have been not actually exported, still as she had begun within the terms of the licence, to do that which was the first step, by breaking ground, to proceed on her voyage, she could not legally alter her situation from that moment. In cases of importation the licences have been always either extended or renewed; so, in this case, as the ship had not arrived and the consignee was in this country, a renewal might in like manner be obtained on application. Under all the circumstances, therefore, the plaintiff is entitled to a new trial, as the licence, in this case, has been fulfilled on his part.

Lord Chief Justice GIBBS.—There is a wide distinction between export and import licences; it is necessary that the former be renewed, as the parties being in this country have no difficulty in making the application, but they cannot be acquainted with the circumstances, attending the importation from abroad.

*Cur. adv. vult. (a).*

---

(a) See the judgment, *post*, p. 177.

---

Friday,  
 May 16th.

TULLOCH v. BOYD.

So, a vessel was held not to be protected under a licence for six months, which was to be renewed on application by the parties, on the return of the vessel from her voyage; it appearing that the licence expired on the 2d of January, and that the ship cleared at the custom-house on the 19th of December preceding, but did not receive her clearance at *Gravesend*, till the 20th of January, being detained by the exporter, who feared a capture by French privateers.

THIS case involved the same question as the preceding, as it depended whether the plaintiff's vessel was protected, as she had not passed *Gravesend*, until the time of sailing limited by the licence had expired. The terms of the licence, and other circumstances, varied in the following

instances: It was an action brought to recover a total loss on the defendant's subscription of £200, to a policy of insurance, dated the 16th of *December*, 1808, on the *Theresa* from *London* to *Holland*, during the vessel's stay there, until the goods were transhipped into craft at sea, and safely landed out of such craft, excepting seizure in port or rivers in *Holland*. The declaration contained two counts; in one of which the loss was stated to have happened by capture, by persons acting under the authority of the *Dutch* government, and in the other by the perils of the sea. A licence granted by the privy council, dated the 2d of *July*, 1808, was given in evidence, which permitted the *Theresa* to make one voyage, navigating in any manner, and sailing under any flag for the space of six months, on condition that the name and tonnage of the vessel should be indorsed at the back of the licence at the time of clearance, which licence was to be renewed on application by the parties at the return of the vessel to this kingdom from the voyage, during the term of six months from the date thereof; as no application was made, it expired on the 2d of *January*, 1809.—It was proved that the vessel was cleared from the custom-house, on the 19th of *December*, 1808, with her cargo on board, and bills of lading duly signed by the captain; but that she did not clear at *Gravesend*, till the 20th of *January*, 1809, as advices had been received that the *douaniers* were vigilant, and that *French* privateers were cruising off the *Dutch* coast, in consequence of which the vessel was detained in this country by order of the plaintiff. The cause was first tried before Lord Chief Justice *Mansfield*, at the sittings after *Michaelmas* term, 1810, when his Lordship was of opinion that the voyage was not protected by the licence, and accordingly nonsuited the plaintiff. He, however, obtained a rule for a new trial in *Michaelmas* term, 1815, and the cause was again tried before

1817.  
  
 TULLOCH  
 v.  
 BOYD.

1817.  
 ~~~~~  
 TULLOCH  
 v.  
 BOYD.

Lord Chief Justice *Gibbs*, at *Guildhall*, at the sittings after last *Trinity* term, when his Lordship concurring with the opinion of Lord Chief Justice *Mansfield*, and following the decisions laid down in the preceding case of *Williams v. Marshall*, and the *Attorney-General v. Poughet*, again directed a nonsuit. A rule *nisi* having been obtained, by the *Solicitor-General*, in last *Michaelmas* term, for setting aside the nonsuit.

Mr. Serjt. *Lens*, in shewing cause, on a former day in this term premised that the particular day of the vessel's sailing down the river did not appear in evidence. The circumstances of this case were stronger than those in *Williams v. Marshall*, as the time here was left to the discretion of the merchant, instead of government, to say how long such a licence should continue. The merchant alone thought proper to detain the vessel, and to repossess himself of those privileges which were limited by the licence. The licence was granted for six months, and the only restriction imposed by government was for the parties to make a further application, when such licence might be renewed, subject to further qualifications. He cited the case of *The Attorney-General v. Poughet* (a), to shew that these circumstances ought to be considered, with reference to the general principles upon which such licences were extended; and submitted that there was no shadow of excuse for the plaintiff's not apprizing the government that he wished for a further extension of time than the terms of the licence afforded him.

The *Attorney-General* and Mr. Serjt. *Vaughan*, *contra*, observed that the arguments advanced in the case of *Williams v. Marshall* were applicable to the present, and that the only distinction existed on the terms of the

---

(a) The *Attorney-General* refused his *fiat*, on a writ of error in this case.

licence. The renewal of the licence, on application by the parties, merely reduces the question to this; that although granted for six months, it is only for one voyage, and in order to proceed on another, it is necessary to renew such licence. At all events, the plaintiff was justified in detaining the vessel, as he dreaded *douaniers* and *French* privateers. The intermediate delay, therefore, was not so culpable as to vitiate the licence, so as to take the parties out of its protection.

Lord Chief Justice GIBBS.—That point would have been a question for the jury to decide, but I told them that as the ship did not sail, even from *London*, till after the time specified in the licence had expired, that therefore she was clearly not within the protection of the licence; but as it is a very important question, and requires full deliberation, we will consider it.

*Cur. adv. vult.*

On this day his Lordship delivered the following judgment.

In the preceding case of *Williams v. Marshall* the court gave judgment for the defendant; but when they were about to decide in this case, they were informed that a case in point was then pending before the court of *Admiralty*, and that the judge of that court was of opinion that licences, under similar circumstances, were effective. They therefore opened the rules for further argument, but as no such case has been transmitted to them, they cannot revoke their former judgment, and both these rules must therefore be

Discharged (a).

---

(a) The reporter believes that the case alluded to by his lordship was that of the *Merc, Floor*, decided in the court of *Admiralty*, which has not been reported. It was cited and commented on by Lord Chief Baron Thomson in the case of the *Attorney-General v. Poughel*, 2 Price's Exch. Rep. 388, 9.

1817.

Friday,  
May 16th.PEELE and others, assignees of WADINGTON, a bankrupt,  
v. NORTHCOTE and another.

Where a broker effected a policy of insurance in the name of his principal, under a *del credere* commission, and guaranteed the solvency of the underwriters in the body of the policy, which was left in the custody of the assured until the broker had paid the loss, according to the terms of the guarantie. —*Held*, that a loss having happened before the bankruptcy of one of the underwriters, and adjusted afterwards, could not be set-off by the broker, in an action brought against him by the assignees to recover premiums due to the bankrupt, either as constituting a mutual debt or mutual credit, although the broker had accounted for such loss with the assured before the bankruptcy.

THIS was an action of *indebitatus assumpsit*, brought by the plaintiffs, as assignees of *Wadington*, a bankrupt, to recover £194 : 10s : 10d., claimed to be due to the bankrupt, before his bankruptcy, as the balance of an underwriting account, existing between him as such underwriter and the defendants, as brokers, in respect of premiums of insurance and losses on several policies which had been effected by the defendants as specified in the plaintiffs' particulars of demand, against which the defendants insisted they were entitled to a set-off, for a loss which had been incurred on a policy, dated the 7th of *Nov.* 1814, and underwritten to them, as brokers, by the bankrupt's agent, on a ship named the *Prince Oscar*. — The items of mutual account between the parties, with the exception of this loss, had been adjusted. The policy on which the loss in question arises, was on goods, and effected by the defendants as the brokers or agents of Messrs. *Brown, Westein, & Co.*, in the name of their principals, and as agents; and was underwritten by the bankrupt, through his agent *Mounsher*, for £200. The defendants acted under a *del credere* commission, and these words were inserted in the body of the policy, *viz.* "It is agreed that the broker shall guaranty the underwriters hereon, without prejudice to this insurance." The ship was lost on the 20th of *February*, 1815, and on the 20th of *July* following, a general average was adjusted and settled, at £97 : 3s : 3d. *per cent.* by all the underwriters, except the bankrupt. But the following memorandum was indorsed on the policy by *Mounsher*, his agent. "Admit to prove £194 : 6s : 6d., under the estate of *H. Wad-*

ington. *W. Mounsher*." The cause was tried before Lord Chief Justice *Gibbs*, at *Guildball*, at the sittings after last *Trinity* term, when it was admitted that *Wadington* became bankrupt, on the 25th of *March*, 1815. It was proved that the defendants had paid the loss in question to *Brown & Co.*, previous to the bankruptcy, and that the policy, which was not effected in the name of the defendants as brokers, remained in the possession of *Brown & Co.*, and had so continued until *Brown & Co.* had sent it to them for the purpose of receiving the loss according to the terms of the guarantie contained therein. The plaintiffs recovered a verdict for the amount of their demand, subject to the opinion of this court, as to whether the defendants, having acted under a *del credere* commission, had a right to set-off such loss as a mutual credit, against the premiums due, as the adjustment of the loss was not made till the 20th of *July*, 1815, and the commission of bankrupt against *Wadington* was dated on the 25th of *March* previous.

Mr. Serjt. *Vaughan* having, in the last *Michaelmas* term, obtained a rule *nisi* that the verdict should be set aside and a nonsuit entered, or a new trial granted,

Mr. Serjt. *Lens*, on a former day in this term, shewed cause, and insisted that the balance on account of this loss could not be set off, as the policy was effected in the name of *Brown & Co.*, and the defendants were not connected with it, except by the clause of guarantie inserted therein. The principle has been reduced in the cases decided on this subject, that the mere acting in the capacity of a broker is not sufficient to entitle a defendant to a set-off. The defendants, in this case, had no lien on the policy, and there was no relation between them and the underwriters, for the mere circumstance of the introduction of the guarantie does not place the brokers in the situation of principals; neither was the policy in the hands of the

1817.  
PEELE  
v.  
NORTHCOTE.



1817.  
PEELE  
v.  
NORTHCOTE.

defendants, but was left with the assured. The effect of the guarantie was merely an undertaking between the defendants, as brokers, and the assured, for the former to guarantee the solvency of the underwriters; no further liability of the underwriters attached by such guarantie, for they were liable, at all events; nor is the effect of the policy altered, if there be a collateral agreement between the brokers and the assured: unless, therefore, the brokers are connected with the underwriters as principals, and the underwriters know them in that character, the former are not entitled to a set-off. If this loss could be set-off, it will be sufficient for a broker to have merely a privity with the assured. It is further necessary that there should be a connexion in the accounts between the brokers and underwriters; but in this case the defendants could not sue in their own names, there being no privity of contract between them and the underwriters. Although the adjustment was not made until after the issuing of the commission of bankrupt, still that would not alter the right of the assignees, as the loss took place previous to the bankruptcy. The relative situations in which the brokers, assured, and underwriters stand with regard to each other, and the cases where brokers may or may not set off losses in actions brought against them by the assignees of an underwriter for premiums, are collected in the last edition of Mr. Justice *Park's* very valuable treatise on *The Law of Insurance* (a), where the distinctions are clearly and elaborately pointed out. All these cases shew that the broker must be the person interested, or that the policy is underwritten in his name: unless, therefore, in this case, the underwriter had given credit to the defendants, they must be considered in the capacity of agents; and, therefore, could not be entitled to set-off:

---

(a) 7th edit. pp. 39 to 43.

the mere guarantie of the solvency of the underwriter does not affect the liability of the latter. The cases of *Grove v. Dubois* (a), and *Bize v. Dickason* (b), have been considerably shaken by later decisions. [Mr. Justice *Park*.—Does not this case come within the decision of Lord *Ellenborough* in *Cumming v. Forrester* (c) ?] It does not appear that the guarantie was made between the defendants, as brokers, and the assured, with the privity of the underwriters. The defendants are interested only with the assured, and the condition of the underwriters is not altered by the insertion of the guarantie. This being a case of a broker, as agent, endeavouring to set-off a loss, where the underwriter becomes bankrupt, falls within the latter class of cases of *Shee v. Clarkson* (d), *Minet v. Forrester* (e), *Goldschmidt v. Lyon* (f), and *Parker v. Smith* (g); the only distinction is, whether the introduction of the guarantie, by the broker, on the face of the policy, can be deemed a privity of contract between him and the underwriters.

The *Attorney-General*, and Mr. Serjt. *Vaughan*, *contra*, submitted that although the defendants might not strictly be entitled to a set-off, they still had a right to bring this loss into the account. The distinction turned, in the cases cited, to where the policy was effected in the name of the broker, or the assured. It has been decided in *Bize v. Dickason* that if a policy be made in the name of a broker, he would have a right to set-off monies due before, although not adjusted till after the bankruptcy. As the plaintiffs, in this case, sue as assignees, it is unnecessary for the defendants to set-off, but it is sufficient for them to shew that there was a debt due to them from the bankrupt, as underwriter, at the time of his bank-

1817.  
PEELE  
v.  
NORTHCOTE.

---

(a) 1 T. R. 112.—(b) 1 T. R. 285.—(c) 1 M. & S. 494.—  
(d) 12 East, 507.—(e) 4 Taunt. 541, n.—(f) 4 Taunt. 534.  
—(g) 16 East, 382.

1817.  
 {  
 PEELE  
 v.  
 NORTHCOTE.

ruptcy, or that a mutual credit existed between them, out of which the debt arose. The guarantie appearing in the body of the policy, is sufficient to shew that it was given to the assureds with the privity or consent of the underwriters; this, therefore, takes it out of the case of *Cumming v. Forester*. If this had been a mere *del credere* commission, given by the assured to the defendants, who guaranteed the solvency of the underwriters, without their authority no action could be maintained; but this guarantie being in the body of the policy must have been authorized by the underwriters, to whom it is advantageous, as the assured would not effect the policy without such guarantie: this therefore is done with the knowledge of all parties, and the defendants had a right to call on the underwriters in the name of the assured, if there were no bankruptcy; or in case of bankruptcy to use the name of the assured, in proving their debt under the commission. [Lord Chief Justice *Gibbs*.—The only question is, whether the bankrupt, as underwriter, authorized the defendants to enter into the guarantie for him; and if such authority were given, whether it would constitute a mutual credit at the time of the bankruptcy, or whether the broker, being afterwards obliged to pay the assured, could set-off this as a debt due before.] The effect of the guarantie is to create a debt immediately on the loss between the brokers and the assured; it must be concluded that the underwriter has authorized such broker to pay the debt whenever the loss might happen, and the effect of such authority would be sufficient to constitute a mutual credit. The case of *Cumming v. Forrester* turned on unliquidated damages, on a subject of set-off; and was, therefore, distinguishable from the present. Lord *Ellenborough* there said, that the claim of the brokers to set-off arose out of an authorized contract made by them with their employers, without the privity of the

plaintiff; but here it must have been done both with the authority and privity of the underwriters:—though the broker is no party to the contract between the underwriters and the assured, a privity of contract still exists between them all. By the doctrine laid down by Lord *Mansfield* and Mr. Justice *Buller*, in *Grove v. Dubois*, the liability attaches on the broker in the first instance; and, whether the underwriter knew the principal or not, still, in case of a loss, it would constitute a mutual credit. The other class of cases is not applicable to the present question. In the case of *Weinbolt v. Roberts* (a), Lord *Ellenborough* said, the broker, with a *del credere* commission, may be looked upon as the owner of the policy, and he being answerable to the insured for the loss, the amount may be considered as due to him, and may be set-off in an action brought against him by the underwriter for premiums. The guarantee being inserted in the policy, authorized the brokers to pay this debt to the assured; and they have therefore a defence to this action, on the ground of mutual credit.

Mr. Serjt. *Lens*, in reply, observed that in *Weinbolt v. Roberts*, the plaintiff had underwritten a policy to the defendant; and that he had a *del credere* commission from the assured for guaranteeing the solvency of the plaintiff and other underwriters, which rendered it doubtful whether the broker was not a party to the policy, and that case was merely confirmatory of *Grove v. Dubois* and *Bize v. Dickason*.

*Cur. adv. vult.*

Lord Chief Justice *GIBBS*, on this day, delivered the decision of the court.—This was a question, whether the defendants, as brokers, were entitled to set-off a loss against a claim made on them for premiums of insurance,

1817.  
PEELE  
v.  
NORTHCOTE.

---

(a) 2 Camp. 588.

1817.  
PEELE  
v.  
NORTHCOTE.

by the assignees of an underwriter, who had become bankrupt, upon policies subscribed by him before his bankruptcy.—The facts of the case were these: A policy was opened, not in the names of the brokers, but of the assured. The assured retained the policy in their own hands; but the brokers guaranteed the underwriters for a *del credere* commission, and were therefore only answerable in the second instance for losses, if any should arise. The loss in question happened before the bankruptcy of the underwriters, and the defendants, as brokers, had consequently paid the loss to the assured: the question then was, whether the brokers, after the bankruptcy, could be called on by the assignees to pay them the loss; and if so, whether such brokers were not entitled to set it off, as money paid to the assured against the claim of the assignees; in short, whether this was a mutual debt existing at the time of the bankruptcy, or a mutual credit. It is quite clear that it could not be a mutual debt, so as to be deemed money paid before the bankruptcy. The only question therefore remaining is, whether it can be considered a mutual credit. If the policy had been opened in the name of the brokers, this case might have been classed with those of *Grove v. Dubois*, *Bize v. Dickason*, and *Weinbolt v. Roberts*. If it remained in the hands of the brokers, then the other class of cases would apply; but neither the one nor the other are applicable to the present question. The names of the brokers were not inserted in the policy; neither was the policy left with them, but remained in the hands of the assured when they made their claim on the defendants, as brokers; they were compelled to pay on account of an obligation they had entered into to guaranty the underwriters, and for which they had received a *del credere* commission. The brokers therefore, had no claims, either to a mutual debt or a mutual credit. The peculiarity which distinguishes this

from the other cases is, that the brokers guaranteed the underwriters, who are parties to the policy. It has been insisted that the underwriters subscribed the policy, on the ground that the brokers had agreed with the assured to guaranty their solvency; and that that is therefore a credit given by them to the brokers. That argument rests on the assumption that the underwriters were parties to the contract. The main question is, whether the brokers were parties: they were merely the agents for both the underwriters and the assured, because they were debtors to the underwriters for premiums which were not paid for at the time the policy was effected; and with respect to the guarantie, no one was interested but the assured. The brokers were paid for it by a *del credere* commission. The policy contained the memorandum, "that it was agreed that the brokers should guaranty the underwriters thereon." The question then is, on the construction of this memorandum, and between whom it was entered into. It can only relate to the assured and the brokers; no one was interested but them; therefore the guarantie was merely evidence of an agreement between those parties. If that be the case, the underwriters are not at all affected by it, and the case stands as if a payment was made by the brokers to the assured under a commission *del credere*, and therefore the brokers are not entitled to set-off those premiums against the losses due from the underwriters.

Rule discharged (a).

1817.  
 ~~~~~  
 PEELE  
 v.  
 NORTHCOTE.

---

(a) See the note to the case of *Houston v. Robertson*, 1 Ho & N. P. Rep. 89.

Friday,  
May 16th.

MILLINGTON v. GOODMIN.

The venue in a declaration being laid in a county palatine, the court would not allow it to be changed, after error assigned for want of an original writ.

MR. Serjt. *Hullock* moved for a rule *nisi* to amend the declaration in this cause, by changing the venue from *Lancashire* to *Gloucestershire*, into which latter county the original writ had issued. The defendant was arrested in *Gloucestershire*, and bail above were put in; but the declaration was delivered in *Lancashire*, where the venue was laid. The defendant having obtained particulars of the plaintiff's demand, suffered judgment by default. A writ of inquiry had been executed in *Lancashire*; final judgment signed, and the costs taxed.—A writ of error was then brought, and the error assigned was the want of an original.

Lord Chief Justice GIBBS.—How can the court permit a record to be amended, after a writ of inquiry has been executed in *Lancashire*? Is there any case where an amendment of this nature has been allowed, after judgment signed?—The action was brought in *Lancashire*. The plaintiff cannot get an original in *Lancaster*, because there is no officer there to grant it, and that is assigned for error. The plaintiff below has himself created the difficulty, by suing out his original writ in *Gloucestershire*, and laying the venue in *Lancashire*.

Rule refused.

GARLAND and another (surviving partners of BAKER, deceased) v. NOBLE and another.

Friday,  
May 16th.

MR. Serjt. *Bosanquet* moved for a rule *nisi* to set aside the award in this cause, on the ground that the arbitrator had declined to enter into one of several matters referred to him, by an order of *nisi prius*, directing the jury to find a verdict for the plaintiffs, with £4780 damages, subject to the award of J. W., to whom the cause and all matters in difference between the parties were referred, so that he made his award by a given day. By an affidavit of one of the defendants, it appeared that an action was brought in 1813, by the plaintiffs, against the defendants, who were partners in *Malta*, respecting the disbursements of a ship. That the plaintiffs proceeded to outlawry therein, which they obtained in *March*, 1814; and that the partnership between the defendants having been dissolved, one of them arrived in *London*, in *December*, 1814, and was immediately arrested, by virtue of a *capias utlagatum*, and imprisoned from that time till the last day of *January*, 1815; that the court, in *Hilary* term, 1814, made a rule absolute for reversing the outlawry, and discharging the defendant on his putting in and perfecting bail, and entering a common appearance for the other defendant. That the costs were paid by the deponent. That a bill in chancery was filed by both the defendants against the plaintiffs, for a discovery, in which the various circumstances, respecting the action brought by the plaintiffs, were stated, and the illegality of the outlawry issued against the defendants. That the cause was referred; when the

An action was commenced against two defendants, as partners, resident abroad.—The plaintiff proceeded to and obtained outlawry; the partnership being dissolved, one of the defendants arrived in *England*, and was arrested on a *capias utlagatum*.—A rule was obtained for reversing the outlawry.—By an order of reference all matters in difference between the parties were submitted to an arbitrator, who refused to consider the claims of the defendants, respecting the outlawry, but confined himself to the action commenced against them.—*Held*, that he was not bound to take the outlawry into consideration, as no joint specific injury

was stated to have been sustained by both the defendants, and the court refused to set aside the award.



1817.  
GARLAND  
v.  
NOBLE.

arbitrator heard evidence on the matters relating to the action; but refused to hear claims for damages sustained by both the defendants, by reason of the illegal outlawry against them jointly, and on account of the imprisonment of the deponent. The arbitrator doubted whether he was empowered to hear evidence in support of such claims, and consulted a barrister, whether such claims could be considered as a matter in difference within the meaning of the order of reference, who was of opinion that the submission by the rule of reference (being of all matters between the parties) meant of all matters between the plaintiffs respectively on the one side, and both the defendants on the other, and therefore did not embrace a matter in difference between the plaintiffs and one of the defendants separately, and that no actual damage had been sustained by the defendants jointly, and therefore that the arbitrator had no jurisdiction to enquire into those claims. That the arbitrator relying on this opinion, refused to consider such claims, and made his award accordingly. The learned serjeant submitted, that as all matters in difference were submitted to the arbitrator, and the authority given to him being conditional, the award was bad, as he had omitted to settle one of the subjects of difference which was stipulated for, and he cited the judgment of Lord *Ellenborough* in the case of *Randall v. Randall* (a).

Lord Chief Justice GIBBS.—If the party complaining had pointed out any specific damage which had been jointly sustained by reason of the outlawry, such damage should have been presented to the arbitrator, as constituting one of the matters in difference between the parties. But I perfectly agree with the barrister, that no such damage

---

(a) 7 E. R. 80. See also *George v. Lonsley*, 8 E. R. 13.

could have arisen. The proceedings on an outlawry are either against the person or property; if against the person, the proceedings could not apply to both the defendants, as one only was arrested: if their joint property had been taken in execution, the applicant should have shewn that such injury had been sustained. This is a trap baited to set aside the award. The arbitrator communicated the opinion of counsel, that no joint injury had been sustained. The party complaining insists that he has received an injury under the outlawry; but still he has not pointed out the specific injury in his affidavit. The arbitrator was informed, by counsel, that no such injury had been sustained; this the party negatived in a general manner, without shewing the distinct matter. As, therefore, the affidavit has not stated a specific joint injury, the rule must be

Refused.

1817.  
GARLAND  
v.  
NOBLE.

JEZEPM v. INGRAM, Sheriff of *Sussex*.

Friday,  
May 16th.

THIS was an action brought against the defendant, as sheriff of *Sussex*, for a false return to a writ of *feri facias* sued out by the plaintiff, against one *Newman*, directing the defendant, as sheriff, to levy £233: 3s: 4d., to which he returned he had levied to the amount of £19 only; and that *Newman* had no other property by which the residue of the debt could be satisfied.—The facts of the case were these: In *October*, 1814, the then sheriff of *Sussex* was in possession of *Newman*'s goods, under a writ of *feri facias*, issued at the suit of one *Gilbert*.—*Newman*

The property and goods of *A.* being in possession of the sheriff under a writ of *fi. fa.*, he executed a deed of assignment to *B.* for a valuable consideration, on which the execution was withdrawn. *B.* superintended the management of the property, but allowed *A.* to

continue in possession. The same property was seized under a subsequent execution at the suit of *C.*—*Held*, that such property was protected by the assignment to *B.*, although *A.* had continued in the visible possession.

1817.  
 {  
 JEZEPH  
 v.  
 INGRAM.

was then labouring under many difficulties; and while the officer was in possession, a person by the name of *Dunk* advanced him £450 to relieve his wants, and on such advance being made, *Newman* executed a deed of assignment to *Dunk*, dated the 13th of *October*, 1814, of all his interest in a farm which he then rented, together with his cattle and implements of husbandry (the household furniture only excepted). *Dunk* superintended the management of the farm until the month of *October* last: he paid all taxes and labourers wages, purchased and sold cattle, and was occasionally present; but *Newman* continued in possession, when *Dunk* was acquainted that the present plaintiff had issued a writ of *feri facias*, for a debt of £460, and that the defendant had seized, not only *Newman's* furniture, but the farming stock, which had been assigned to *Dunk*, together with the crops on the land, and that the officer was about to proceed to a sale thereof. On the 30th of that month *Dunk* served the officer with a notice, stating the particulars of the deed of assignment, and that he had continued to manage the business of the farm from the date thereof; and that all the property taken under the *feri facias*, except the household furniture, was his. The whole of the effects were sold on those terms, viz. that the sheriff should pay over to the plaintiff the amount of what the furniture sold for, and return *nulla bona* as to the residue, the stock, and farming utensils having passed from *Newman* to *Dunk*, under the assignment. The household furniture not being protected by the deed, sold for £19, and the stock and crops for £538. By the account of the receipts and payments kept by *Dunk*, there appeared to be due to him from *Newman* £287, at the time of the sale; besides the £450 advanced by him at the time of executing the deed: the defendant therefore returned, that he had levied £19, and that *Newman* had no more goods in his baili-

wick: this sum the plaintiff refused to accept, and commenced the present action against the sheriff, who was indemnified by *Dunk*.—The cause was tried at the sittings in *Middlesex*, after the last term, before Mr. Justice *Dallas*, when it was insisted that as *Dunk* had no visible possession of the property, it could not pass under the deed of assignment. The learned judge left it to the jury to say, whether the assignment to *Dunk* was fraudulent, if so, they would find a verdict for the plaintiff; but if there had been a *boná fide* assignment to *Dunk*, they would then find a verdict for the defendant. They, however, returned a verdict for the plaintiff, assigning as their reason for so doing, that although the money, which was the consideration of the deed, was fairly advanced by *Dunk*, still they considered that there was a want of sufficient notoriety of the transfer of the property.

Mr. Serjt. *Best*, on a former day in this term, had obtained a rule *nisi*, that this verdict should be set aside, and a new trial granted, or that a verdict might be entered for the defendant.

Mr. Serjt. *Vaughan* and Mr. Serjt. *Copley* now shewed cause against the rule, and contended, that although the deed of assignment might not be absolutely fraudulent, still, as *Newman* continued on the farm, the possession was not changed, though *Dunk* might be occasionally there; but they insisted that the assignment was, in fact, fraudulent, and relied on the stat. 13 *Eliz. c. 5. (a)*, which

1817.  
  
 JEZEPH  
 v.  
 INGRAM.

---

(a) By sect. 6, it is enacted, that "That act, or any thing therein contained, should not extend to any estate or interest in lands, tenements, hereditaments, leases, rents, commons, profits, goods or chattels, had, made, conveyed or assured, which estate or interest was, or should be, upon good consideration, and *boná fide*, lawfully conveyed or assured to any person or persons, or bodies politic or corporate, not having at the time of such conveyance or assurance to them made, any manner of notice or knowledge of such covin, fraud, or collusion."

1817.  
 JEZEPH  
 v.  
 INGRAM.

makes void all fraudulent deeds or conveyances made to avoid the debts of others.—Not only a good and valuable consideration is necessary to comply with the terms of that section, but a *bonâ fide* conveyance and possession are also requisite: and here the possession has been inconsistent with the deed of conveyance. The case of *Edwards v. Harben* (a) was not determined on the statute of 21 *Jat.* 1, c. 19, s. 11. That statute was wholly inapplicable to the present case, as it provided for property in the visible possession of persons who had become bankrupts, and in *Stone v. Grubham* (b), which was decided before the statute of *James* was past, it was held that an absolute conveyance, unattended by possession, was fraudulent; and Mr. Justice *Butler*, in *Edwards v. Harden* said, that it had been always held, that if a man sell goods and still continue in possession as visible owner, such sale is fraudulent and void as against creditors. The case of *Kidd v. Rawlinson* (c) was distinguishable, as it turned on the notoriety of the transfer; and Lord *Eldon* there admits the distinction. If *Dunk* had an ostensible conveyance of the property, then this case would come within that of *Kidd v. Rawlinson*; but this deed of assignment was merely a private engagement between him and *Newman*. Although the transaction may not be fraudulent, *per se*, it still bears the semblance of fraud. The jury said, that though they were satisfied that *Dunk* had advanced the money, still there ought to have been a more notorious promulgation of the transfer. In *Halbird v. Anderson* (d), Lord *Kenyon* says, that the statute of *Eliz.* did not apply to that case, as the warrant of attorney was there given on a good consideration, and the words *bonâ fide* only applied to those cases where possession was not delivered,

---

(a) 2 T. R. 587.—(b) 2 *Bulstr.* 218.—(c) 2 B. & P. 59.  
 —(d) 5 T. R. 237.

or where it was merely colourable. In *Twyne's case* (a), the vendor continued in possession, and the bill of sale was held void on that ground, notwithstanding there was a good consideration for it. In *Cadogan v. Kennett* (b), Lord Mansfield in commenting on the statute 13 Eliz. c. 5. said, 'If the transfer be not *bonâ fide*, the circumstance of its being done for a *valuable consideration* will not alone take it out of the statute.' In *Wordall v. Smith* (c), it was held that an assignment of personal property was void as against creditors, unless there was a complete change of possession, and it was not enough that a person was put in to keep possession *jointly* with the assignor; and Lord Ellenborough there says, 'There must be a *bonâ fide*, exclusive and substantial change of possession, under an assignment, or it is fraudulent as against creditors. A concurrent possession with the assignor is colourable.—There must be an exclusive possession under the assignment.' The want of notoriety of the conveyance at the time, and the continuance of possession, though consistent with the deed itself, without notice of the change of property, were also fully considered in *Dewey v. Bayntun* (d). At all events, this was a mixed possession, and, therefore, comes within the case of *Wordall v. Smith*; and as the assignment was absolute, the case of *Edwards v. Harben* must govern the present, as the possession did not immediately accompany and follow the deed; and *Kidd v. Rawlinson* was particularly distinguishable, as in this case, there was no notoriety of the transfer of property, but merely a private transaction between the parties. The plaintiff therefore is clearly entitled to retain the verdict.

Mr. Serjt. Best, in support of the rule, was stopped by the court.

1817.  
JOSEPH  
v.  
INGRAM.

(a) 3 Coke Rep. 80.—(b) Cowp. 434.—(c) 1 Camp. 332.  
—(d) 6 E. R. 257.

1817.  
 ~~~~~  
 JEZEPH  
 v.  
 INGRAM.

Lord Chief Justice GIBBS.—The court is extremely cautious in disturbing those land-marks, which have hitherto afforded a security to parties. But they will not do so by stating that this is a fit case for further enquiry. If a person be put into possession of property under a deed, and so remain, there can be no colour of fraud. But this doctrine cannot be carried further.—The question is, whether, under the circumstances, there is sufficient to render this a possession; and, therefore, whether this case be not distinguishable from those that have preceded it. In the first place, there is an evidence of mixture of possession; but I do not rest on that. The circumstances of this case are dissimilar from those of *Edwards v. Harben*, which was a mere sale, without possession. This, therefore, is a middle case between those of *Kidd v. Rawlinson*, and *Edwards v. Harben*. The principles of *Kidd v. Rawlinson* do not govern this. The question there was, whether the plaintiff had purchased goods with a view to defeat an execution by any of the creditors of the person, against whom the execution was issued.

The cases cited by my brothers *Vaughan* and *Copley* are those of mere dry conveyances, without the causes being assigned. In *Kidd v. Rawlinson*, the conveyance was absolute: but it was not so here. The goods there were actually taken in execution, and exposed to sale by the sheriff, and it was notorious to all the neighbourhood. The result of the evidence here is, that the sheriff did not carry away, or dispose of the goods, but liberated them, on taking a security from *Dunk*.—This, therefore, comes nearly within the doctrine laid down by Lord *Kenyon*, in the case of *Kidd v. Rawlinson*.—‘If *Kidd* had lent money to *A.* (whose goods were taken in execution) to buy these goods, and had then taken a conveyance of them, or a security for his debt, thus arising out of the

mere act of lending the money, leaving *A.* in possession of the goods, it would not have been a fraudulent act.'— This is not the case of a dry sale, and leaving the party in possession; on the other hand, it is not a sale by the sheriff, but money is paid him to redeem the goods, and then there is a conveyance from *Newman* to the person who advances the money. It requires further consideration, merely to shew that it is not overturning former decisions; but that this is a case between those of *Edwards v. Harben* and *Kidd v. Rowlinson*, one of which is stronger, the other weaker than the present. I therefore think there should be another trial.

Mr. Justice DALLAS.—I am of the same opinion: I dissent from my brother *Copley*, that the case of *Edwards v. Harben* lays down a general rule, that in transferring chattels, the possession must accompany and follow the deed. In *Kidd v. Rowlinson*, the question did not only turn on the notoriety of possession, but whether the goods being left in the possession of the former owner was good.

Mr. Justice PARK.—It is of great importance that this case should undergo further enquiry; the parties not continuing in possession, does not always carry with it a badge of fraud. It is laid down in Mr. Justice *Butler's* *Law of Nisi Prius* (a), 'that the donor's continuing in possession is not, in all cases, a mark of fraud; as where a donee lends a donor money to buy goods, and at the same time takes a bill of sale for securing the money.'

Mr. Justice BURROUGH.—This case certainly requires great consideration; and it is therefore proper that there should be a new trial.

The rule for a new trial was accordingly made

Absolute (b).

1817.  
JESEPH  
v.  
INGRAM.

(a) 209.—(b) See *Estwick v. Caillaud*, 5 T. R. 480.—*Leonard v. Baker*, 1 M. & S. 251.—*Pickstock v. Lyster*, 3 M. & S. 371.



Saturday,  
May 17.

INGLIS v. MACDOUGAL.

If a surety enter into a bond with a principal, conditioned for the performance of covenants contained in an agreement for a lease, such surety is still liable, although the principal become bankrupt and be discharged under the 49 G. 3. c. 121, s. 19.

THIS was an action brought by the plaintiff as treasurer of the *London-Dock-Company*, on a bond conditioned for the performance of covenants contained in articles of agreement for a lease, granted by the company to one *Paton*. The declaration stated that the defendant signed the bond as a surety for *Paton*, and assigned for breach, rent in arrear. The defendant pleaded, *First, non est factum*; and, *Secondly*, that *Paton* became bankrupt, and assigned all his property to assignees for the benefit of his creditors, who accepted and took on themselves the covenants contained in the articles of agreement, as recited in the condition of the bond, and all benefit therefrom, as part of the bankrupt's estate, whereby *Paton* was discharged from the bond, and condition. —The cause was tried before Mr. Justice *Burrough*, at the sittings after last term, when the only question was, whether the assignees of *Paton* had accepted his property, and proceeded to a sale thereof. It appeared by the evidence, that the assignees had assented to a sale, although the property was not disposed of, and the jury, under the direction of the learned judge, found a verdict for the plaintiff, on the first issue, to the amount of the rent in arrear; and for the defendant on the second issue, or special plea.

Mr. Serjt. *Best*, on a former day in this term, moved for a rule *nisi*, that judgment might be entered for the plaintiff on the second plea, *non obstante veredicto*. He founded his motion on two grounds: *First*, that the second plea was not supported by the evidence; and *Secondly*, that although the bankrupt might be discharged by the

assignees having taken possession of his property ; still, the defendant, as his surety, was not protected by the 49 Geo. 3, c. 121, s. 19 (a), and that he consequently remained liable. The court granted the rule on the latter ground only.

1817.  
W  
 INGLIS  
 v.  
 MACDOUGAL.

Mr. Serjt. *Lens* now shewed cause, and stated, that the only question was, whether the bankrupt being discharged by the 49 Geo. 3, the defendant as his surety was not also released thereby ; and he contended that such discharge must by necessity extend to the sureties, as well as to the bankrupt himself. If a bankrupt be discharged, either by act of party or operation of law, those who have engaged for him by bond are also exonerated. This was not a bond for the payment of a specific sum of money, but an obligation on the part of the defendant, as surety for the performance of certain covenants by the bankrupt, as contained in the articles of agreement. The statute dissolves all covenants made by the bankrupt, and his obligations are thereby at an end, so also are the obligations of his sureties, and the general principle is, that if a covenant be discharged as to a principal, such discharge will extend to the sureties also, and satisfaction by a release to one party discharges the other. The case of *Dean v. Newball* (b), was distinguishable from the present, as there, the obligee had covenanted not to sue, and the question turned on the

---

(a) By which it is enacted, " That in all cases in which a commission of bankrupt shall be sued forth against any person after the passing of that act, and such person shall be entitled to any lease or agreement for a lease, and the assignees shall accept the same, and the benefit therefrom, as part of the bankrupt's estate and effects, the bankrupt shall not be, or be deemed to be, liable to pay the rent accruing due after such acceptance of the same as aforesaid, and after such acceptance the bankrupt shall not be liable to be in any manner sued in respect or by reason of any subsequent non-observance or non-performance of the conditions covenants or agreements therein contained."

(b) 8 T. R. 168.

1817.

INGLIS

v.

MACDOUGAL.

operation of the covenant. In *Lacy v. Kynaston* (a) it was held that 'where a covenant is joint and several, a release to one of the covenantors is a release to all,' and in *Clayton v. Kynaston* (b) the court held that where two are jointly and severally bound, a release to one discharges the other. Releases, either by a voluntary act of the parties, or by the operation of law, are equally binding. If by a release the principal is discharged, the surety must be discharged also. There is merely a formal, and not a substantial difference, between a bond of this description and a release. It is therefore perfectly clear, that the 49 Geo. 3 extends to sureties, as well as to the bankrupt himself, and that the former cannot remain liable, if the latter be entitled to his discharge.

Mr. Serjt. *Best*, and Mr. Serjt. *Bosanquet*, in support of the rule, having cited the case of *Welsh v. Welsh* (c), were stopped by the court.

Lord Chief Justice GIBBS.—It is impossible to conceive that the legislature intended to discharge those sureties who have been required to give security, although the bankrupt might be no longer answerable for payment; as persons would not give credit, unless such sureties were responsible. The very object of taking sureties is to provide against the insolvency of the principal; and the object of the insolvent acts and statutes applying to bankrupts is to discharge debtors and bankrupts from obligations, but not to disturb the claims of creditors on other persons, as sureties, from the failure of such debtors or bankrupts. In this case, the bond is void if the bankrupt perform certain covenants in a deed, that is, if he shall *actually* perform them. If he do not perform them, and avail himself of an excuse, it is immaterial to the plaintiff whether the original debtor does not pay, but

---

(a) 1 Lord Raym. 690.—(b) Salk. 574.—(c) 4 M. & S. 333.

the true sense of the obligation is, that in default by the principal, the sureties are liable to pay. In another clause (a) of the 49 G. 3. c. 121, the bankrupt is discharged from annuity creditors, but the sureties are not thereby discharged. It could not have been intended, that if a bankrupt be unable to pay, the annuity no longer exists; and that the sureties also are exonerated from payment. The sureties, therefore, remained liable, although the bankrupt himself was discharged, and the defendant therefore is answerable.

1817.  
INELIS  
v.  
MACDOUGAL.

Mr. Justice DALLAS.—The only object of sureties is to provide for the solvency of the principal; although the bankrupt be no longer liable, the sureties are, and the statute 49 Geo. 3 only applies to the mere personal discharge of the bankrupt, and not of the sureties also.

Mr. Justice PARK.—If this were the case, a party taking sureties would be in no better situation than if he had taken none.

Mr. Justice BURROUGH.—The statute 49 Geo. 3 cannot operate to discharge the sureties of a bankrupt. The act is cautiously worded; if the legislature had intended that protection should be extended to the sureties, as well as to the bankrupt, it would have been so expressed in the statute. The cases cited by my brother *Lens* are inapplicable to this question: a release presumes a satisfaction. Nothing but actual payment can discharge the sureties in this case, and therefore the defendant is not within the statute.

Rule absolute, as to judgment,  
*non obstante veredicto (b).*

---

(a) Sect. 17. (b) See the cases of *Martin v. Brecknell*, 2 M. & S. 39. and *Page v. Russell*, 2 M. & S. 551, intended to have been cited in further support of the rule.


Saturday,  
May 17th.

JOHNSTON v. CLAY.

An action of debt was commenced against the defendant for the non-payment of rent, and discontinued. An action of covenant was then brought for the same rent which the defendant tendered previously to its commencement. *Held*, that such tender was well pleaded.

THIS was an action of covenant for non-payment of rent. The declaration stated, that by an indenture, dated the 22d of *June*, 1809, made between the plaintiff and the defendant, the plaintiff demised a messuage from the 24th of *June* following, for six years and three-quarters, at the yearly rent of £115: 10s.; and assigned for breach that £231, for two years rent, were due on the 25th of *December*, 1815. The defendant as to the sum of £145, parcel of the said £231, pleaded payment; and as to the sum of £86, residue, said that the plaintiff ought not to recover any damages by reason of the non-payment thereof; because he said, that he, the defendant, always from the time, when the sum of £86, residue, &c. became due and payable, hitherto had been and still was ready to pay the plaintiff that sum, &c.; and that the defendant, after the sum of £86, residue, &c. became due and payable, and before the commencement of this suit, to wit, on the 12th of *June*, 1816, tendered the sum of £86, residue, &c. to the plaintiff, which the plaintiff refused to accept, and which the defendant then brought into court, &c. Replication, that the defendant had not always, from the time when the £86, residue, &c. became due and payable, been ready to pay the same to the plaintiff; but that on the contrary thereof, after the time the £86, residue, &c. became due and payable, to wit, on the 20th of *January*, 1816, the sum of £86, residue, &c. was then demanded by the plaintiff from the defendant, and which the defendant refused to pay. The rejoinder denied the demand, as alleged in the replication, on which issue was joined.—The facts of the case were, that the plaintiff, in *Hilary* term, 1816, commenced an action of debt against

the defendant for the same rent, to which the defendant pleaded. The plaintiff having found that the action should have been in covenant, discontinued that suit, and commenced the present action. Between the time of the rule to discontinue the first action, and the commencement of the present, the defendant tendered the £86; the £145 having been paid to the plaintiff by the person to whom the lease had been assigned.—The cause was tried at *Guildhall*, before Lord Chief Justice *Gibbs*, at the sittings after last term, when the plaintiff produced no proof of the demand, except the writs in both actions; the former of which was issued on the 8th of *February*, and the latter on the 22d of *June*, 1816.—His lordship considered that neither of these writs constituted a demand subsequent to the tender: The jury, however, found a verdict for the plaintiff.

1817.  
  
 JOHNSTON  
 v.  
 CLAY.

Mr. Serjt. *Vaughan*, on a former day in this term, had obtained a rule *nisi*, that this verdict should be set aside and a nonsuit entered.—He insisted that the process in both actions was not a sufficient answer to the plea, as the writ, in the first, was unconnected with the present demand, and relied on the case of *Stratton v. Savignac* (a), and as the tender was made before the commencement of the present action, the plea was substantially good.

Mr. Serjt. *Best* now shewed cause against the rule, and contended, that in covenant for the payment of money on a given day, a plea of tender after such day was bad. The case of *Hume v. Peploe* (b) was similar to the present, where it was held that a plea of tender, after the day of payment of a bill of exchange, and before action brought, was not good; though the defendant averred that he was always ready to pay from the time of the indenture, and that the sum tendered

---

(a) 3 B. & P. 330.—(b) 8 East, 168.

1817.  
JOHNSTON  
v.  
CLAY.

was the whole money then due; so, in *Giles v. Harris* (a), it was held, that where a person had refused to pay money due on a certain day, a tender after that day could not be pleaded; the defendant has not always been ready to pay since the debt accrued; and, therefore, cannot avail himself of this plea; for, by pleading to the first action, he admitted his liability to the plaintiff, and the tender was not made previously to that action having been brought. The distinction is, where money is payable on a given day, and although the plaintiff should have brought his first action in covenant instead of debt, still that circumstance is immaterial.

Lord Chief Justice GIBBS.—I am clearly of opinion that this tender is well pleaded. What are the facts of the case? An action of debt was commenced by the plaintiff, for rent which was discontinued. Previous to the commencement of this action, which was in covenant for the same cause, the tender was made to the plaintiff, who therefore cannot establish the fact of a demand, subsequent to the tender. There can be no doubt, where there is a covenant for the payment of money, that a tender made before the commencement of the action is sufficient. Suppose three-quarters rent were in arrear, a cause of action would have accrued to the plaintiff; and, if the defendant had tendered that sum, previous to the commencement of the action, it would be a complete bar thereto.

Mr. Justice BURROUGH.—A writ of debt for the whole sum cannot be a demand under this action, which is for a part only; a tender is pleaded, merely in bar of ulterior damages, and not in bar of the action.

*Per curiam,*

Rule absolute.

---

(a) 1 Lord Raym. 254.

DEANE v. Sir WILLIAM CLAYTON, Bart. (a).

Monday,  
May 19th.

THIS was an action on the case, brought against the defendant for killing the plaintiff's dog by means of dog-spears set in the grounds of the defendant.—The cause was tried at *Oxford*, at the Spring assizes, 1814, before Mr. Justice *Dallas*, when the jury found a verdict for the plaintiff, damages £15, subject to the opinion of this court, whether the action could be sustained. The *Solicitor-General*, in the following term, obtained a rule *nisi*, to set aside the verdict and have a new trial granted.—The case was first argued in *Michaelmas* term, 1815, by Mr. Serjt. *Vaughan* for the plaintiff, and Mr. Serjt. *Lens* for the defendant; and the court, having taken time to consider, directed the case to be turned into a special verdict.—In *Easter* term, 1816, the special verdict was argued by Mr. Serjt. *Best*, for the plaintiff, and Mr. Serjt. *Bosanquet* for the defendant. The court, considering the case to embrace a new and very important point, took time for deliberation; and, being divided in opinion, on this day delivered their judgments, *seriatim*, as follows:

Mr. Justice BURROUGH.—This was an action on the case brought against the defendant for killing the plaintiff's dog, by means of dog-spears, set in the grounds of the former. The *first* count of the declaration is the only material part of the pleadings, which states, That before

(a) The arguments of counsel in this case are most correctly and fully reported in 2 *Marsh.* 577.

from any of the foot-paths, with each end pointing along a hare-track. On the outside of the defendant's woodland were placed painted notices that "steel-traps, spring-guns, and dog-spikes, and also spring-traps for vermin," were set therein. The plaintiff was sporting, by permission, in the woodland of *J. T.* with a pointer dog, where a hare was started and pursued by his dog into the woodland of the defendant although the plaintiff used every means in his power to prevent such pursuit, the dog entered the woodland of the defendant, ran against one of the spikes, and was killed. The plaintiff having brought an action on the case against the defendant to recover damages for the loss of his dog, this court were equally divided in opinion, whether the defendant were authorised in fixing the dog-spears, or whether he were answerable to the plaintiff for damages for the loss of his dog.

The defendant being the owner and occupier of certain woodlands adjoining and divided from another woodland of *J. T.* by an insufficient fence to prevent dogs from passing from one woodland to the other, through which woodland of the defendant there were several public foot-paths not fenced off; the defendant, for the preservation of hares in his woodland, and to destroy dogs and foxes which might come in pursuit of them, fixed iron spikes, called dog-spears, sharp at each end, into several trees, under which a hare might pass without injury, but a dog in pursuing such hare would be liable either to be wounded or killed. None of these spikes were at a less distance than fifty yards



1817.  
DEANE  
v.  
CLAYTON.

and at the time of committing the grievance by the defendant hereinafter mentioned, the plaintiff was passing upon and over a certain wood, piece, or parcel of land adjoining a certain other wood, or parcel of land of the defendant, and separated therefrom by a certain mound or bank of earth, in the parish of *Lewknor*, in the county of *Oxford*, with a certain dog of the plaintiff's, of the value of £50, and that he, the plaintiff, so going and passing upon and over the first-mentioned wood or parcel of land with his dog as aforesaid, afterwards and before the committing the said grievance, &c. viz. on the 20th Nov. 1813, at, &c., a hare started up in the first-mentioned wood, or parcel of land, in sight and view of the plaintiff's dog, and ran along the same wood, over the same mound, into the defendant's wood, in and along a certain track or hare-path, in the same; and the plaintiff's dog immediately followed the said hare along the first-mentioned wood, over the said mound, and, against the will and inclination of the plaintiff, ran into the defendant's wood, in and along the said track, or hare-path, in the defendant's wood, in pursuit of the said hare. Yet, that the defendant wrongfully, injuriously, and maliciously contriving and intending to injure, prejudice, and aggrieve the plaintiff, in this behalf, and to wound, kill, and destroy his said dog, and to deprive him of the same, heretofore, to wit, &c. wrongfully and injuriously put, placed, drove and fixed, and caused to be put, &c. into divers trees and pieces of wood, then standing and being in, upon, and near to divers parts of the said track, or hare-path, or way in the defendant's wood, divers nails, spikes, and iron instruments of great length, to wit, of the length of two feet respectively, with the intent to kill, wound and destroy any dog or dogs, running in and along the said track, or hare-path, by means whereof the plaintiff's dog, in pursuing the said hare along the said track, or hare-path, in the defendant's said wood, necessarily and unavoidably, and with great force and

violence, ran and was forced upon and against the said nails, spikes, and iron instruments, and thereby was greatly lacerated, wounded, and injured, and afterwards died, and became wholly lost to the plaintiff: There were other counts, stating the facts more generally, and the defendant pleaded the general issue, of not guilty.

The facts, as stated by the special verdict, were, that before, and at the time in the declaration mentioned, the defendant was the owner and occupier of certain woodlands, in the parish of *Lewknor*, in the county of *Oxford*, being parcel of a large tract of woodland, and adjoining on one part to certain woodlands belonging to, and in the occupation of *J. Townsend*, Esq., and divided therefrom by a low bank, or mound of earth, and a shallow ditch; such bank and ditch not being a sufficient fence to prevent dogs from passing from Mr. *Townsend's* woodland to that of the defendant; that for a long time before, and also during all the time of the defendant's possession of his woodland, there were certain public foot-paths through the said tract of woodland, and through that part thereof belonging to the defendant, which public foot-paths were not fenced off from the land through which they respectively led: That before the time in the declaration mentioned, the defendant, in order to preserve hares in his said woodland, and to prevent them from being killed therein by dogs and foxes, did, for the purpose of wounding and killing dogs and foxes, which might come into his woodland in pursuit of hares, cause several iron spikes, called dog-spears, to be screwed and fastened into several of the trees in his said woodland; and did also for the same purpose keep them so screwed, &c. until the time in the declaration mentioned, the said spikes having each two sharp ends, and being so placed, as that each end should point along the course of some one of these tracks of the woodland, which were frequented by hares, called hare-paths, and being

1817.

DRANE

v.

CLAYTON.

1817.  
DEANE  
v.  
CLAYTON.

also purposely placed at such a height from the ground, as to allow a hare to pass under them without injury; but to wound and kill any dog which might happen to run against one of the sharp ends thereof; the said spikes being from their nature and position adapted to effect the said purpose for which the defendant had caused them to be screwed and fastened as aforesaid: That no one of the said spikes was placed at a less distance than fifty yards from any one of the said public foot-paths, some of them being at that distance, others at the distance of one hundred and fifty yards, and others at intermediate distances, between one hundred and fifty and one hundred and sixty yards: That before the time in the declaration mentioned, the defendant caused notices to be painted on certain boards, placed at the outside of some parts of his said woodland, in the following words: 'Take notice, that steel-traps, spring-guns, and dog-spikes, are set in these premises; and steel-traps are set in this wood for vermin;' meaning the defendant's woodland, and that such boards and notices remained in their places at the time mentioned in the declaration: That on the day mentioned in the declaration, the plaintiff, by the consent and permission of Mr. *Townsend*, went into his woodland for the purpose of sporting, accompanied by a pointer-dog of the plaintiff's, of the value of £15, being the dog mentioned in the declaration: That while the plaintiff was there for that purpose, and near the defendant's woodland, a hare got up in Mr. *Townsend*'s woodland, which was immediately seen and pursued by the dog, out of Mr. *Townsend*'s woodland, over the said mound or bank and ditch, into the defendant's woodland, and the said dog so pursuing the said hare in the last-mentioned woodland ran against one of the sharp ends of one of the said spikes, and was thereby wounded and killed; that the plaintiff endeavoured, as much as in him lay, to prevent his dog

from pursuing the hare into the defendant's woodland, but was unable to do so.

The first argument in this case had taken place before I had a seat in the court. The novelty and difficulties attending it had suggested the propriety of further consideration; a second argument was therefore directed, which has taken place in my time. Finding that able judges appeared to entertain opinions on the subject which did not accord with impressions made on my mind, I have read every case which in the course of these arguments was cited at the bar, and have examined, as far as I have been able, the grounds on which they were decided; I have given the facts stated in the special verdict the fullest consideration before I formed my ultimate opinion. Pursuing this course, I have treated the judgments of those who differ from me with the greatest respect; and had my mind at length been left in a state of doubt, my knowledge of the opinions which others entertained would have led me to believe that I had formed an erroneous judgment; but having no doubt on the subject, it is my duty to deliver my opinion. It is a great consolation to me, that mine will not be a single opinion on this occasion.—In questions, the decision of which depends on the principles of the common law, and which are attended with difficulty and doubt, I have been used to look forward to the consequences which must result from the decision. If great inconveniences will result from one decision, which may be avoided by a different course, I think that the court ought to be satisfied before it decides, that the law is clear, and that it imperatively calls for a decision, which will produce these inconveniences; to this extent only do I suffer the idea of inconvenience to affect my mind. The wisdom of ages has, in *England*, perfected and established a system of law, called the common law. This law is adapted to the general regulation of the

1817.  
DRAKE  
v.  
CLAYTON.

1817.  
 ~~~~~  
 DEANE  
 v.  
 CLAYTON.

conduct of the subjects, as members of society : its principles, if accurately attended to, will be found all to point to that end. If the common law of *England* says, (as contended for by the defendant) that he may erect, and keep erected in his open and unenclosed close for the preservation of hares, these instruments, calculated to wound and destroy, and with intent to wound and destroy all dogs which may come into that close in pursuit of hares ; I know this must be founded upon a supposed right to protect the species of property he has in the hares in his close, although the injury done to him would, in legal consideration, merely be a trespass.—If this be law, then it will follow as an unavoidable consequence, that any man, the occupier of a close so circumstanced, may erect and place in it any instruments, however dangerous, to prevent any man or his cattle from trespassing on his close, with intent to wound and injure him or his cattle who may chance to enter on the close, although a mere trespass is thereby committed ; and this, although the same common law has provided apt remedies for every injury he may sustain by such entry.—An action for damages may be sustained against the man for the damage done by himself or his cattle, or the cattle may be distrained, (but not killed or wounded) for the damage done. I admit, in the fullest terms, that if the owner of the close were to tell *A.* that such instruments were placed, and he were, notwithstanding, wilfully to run against them, that he could not complain of the injury in a court of law. The special verdict, in this case, does not state that the plaintiff, or Mr. *Townsend*, had notice of what was done by the defendant. • If such a fact had been material, it ought to have been positively found ; but circumstanced as this case is, I conceive it not to be material. The defendant must, I conceive, mean to contend, that he has a right to do what he has done, as against all mankind. In the case on this record,

he contends, that he is justified as against one, who is, by the permission of Mr. *Townsend* lawfully sporting on his land, and, in effect, as against Mr. *Townsend*, who is circumstanced in every respect as the defendant is; and this, although Mr. *Townsend* may be thereby interrupted in the same uses and enjoyments of his land, and the hares therein, which the defendant claims to be entitled to. I cannot find any principle of the common law which clearly warrants this. What the defendant is found to have done must be carefully distinguished from things done to guard a dwelling-house and enclosed property occupied with it, from the depredations of robbers, or persons who come thither for the purpose of committing felony, and from persons who come thither for the doing such violence to man, as would amount to a breach of the peace, and be indictable as such. In *Brack v. Copeland (a)*, cited at the bar, the defendant, a carpenter, kept a dog for the protection of his yard, and for that purpose let it loose at night: Lord *Kenyon* on that occasion said, 'every man had a right to keep a dog for the protection of his yard.' I mention this only as an instance. Any other species of protection may be resorted to, and persons who enter for plunder have no right to complain if damage is done to their persons. They are criminal wrong-doers, who enter for the purpose of committing felony or breaches of the peace. Having said thus much, by way of introduction, I will state more distinctly the principles which govern my judgment.—*First*, I am of opinion that the acts of the defendant, stated in the special verdict, were unlawful, and that the plaintiff, having sustained an injury thereby, without any default in him, is entitled to maintain this action:—

1817.

DEANE

v.

CLAYTON.

(a) 1 *Exp.* 203.

1817.  
 DEANE  
 v.  
 CLAYTON.

*Secondly*, I am of opinion that if the plaintiff had been a trespasser, or otherwise in default, by the entry of his dog on the defendant's premises, as stated in the special verdict, the defendant could in no manner have justified the direct killing of the dog:—*Thirdly*, I am of opinion that he cannot justify doing that indirectly, which he would not have been warranted in doing directly. As to the first of these propositions, that the acts of the defendant, stated in the special verdict, were unlawful, and that the plaintiff having sustained an injury thereby, without any default in him, is entitled to maintain his action.—After stating the situation of the defendant's and Mr. *Townsend's* property, the verdict states, that the defendant, in order to preserve hares in his woodland, and to prevent them from being killed therein by dogs and foxes, did, for the purpose of wounding and killing dogs and foxes that might come into his woodland in pursuit of hares, cause the instruments to be erected in the hare-paths in his wood, so as to wound or kill any dog that should happen to run against them, and being from their nature and position adapted to effectuate the said purpose, for which they were screwed and fastened to the trees. The principle of *sic utere tuo, ut alienum non lædas*, is familiar to every one. In a very useful book, *Jacob's Law Grammar*, in which many principles of the common law are collected, I find the same principle stated more fully, and in a manner which more clearly shews its true meaning. It there runs thus: *Prohibetur ne quis faciat in suo quod nocere possit in alieno: et sic utere tuo ut alienum non lædas*. This principle is, in all its parts, restrictive of the use a man may make of his property. It shews that he is not to make any use he pleases of it; but that he is so to use it as not thereby to injure another; he must look forward to the situation of others. Another may be injured in his person or his property; he

is not to injure another in the enjoyment of his rights or property. Every case of (what is ordinarily called) nuisance, which is injurious to another in the enjoyment of his property, whether by setting up a noxious trade, a noisy occupation, or by erecting a building which darkens another's light, is an instance falling within this rule and governed by it. Intention to cause the injury is not the governing feature of all these cases, although it may, in many cases of the kind, be an important fact. If the thing be done, and the injury to another's rights be the consequence, the law will, if necessary, supply the intention. But I conceive that express intention may make that act, in some cases, unlawful in the beginning; so that where the injury intended follows, a right of action accrues; when, if there had been no such intention, it might be doubtful whether the party would have any ground of action. The noxious trade, the noisy occupation, or the erection of the building, considered abstractedly from the rights of others, is perfectly innocent; but if another has an existing right, and is in consequence injured by it, or prevented from the reasonable enjoyment of such right, he sustains an injury, for which an action may be maintained. I conceive that every person is protected by this rule, who has a right equal to that of him who does the act, and who is injured without his default in the exercise of that right. In the cases of the nuisances I have particularized, the intention to do the injury is not an essential ingredient in the action. The act and the injury to the right, are the essential ingredients. In cases where intention is necessary, the law will supply it. In *Parkhurst v. Forster* (a), which was an action

1817.  
DEANE  
v.  
CLAYTON.

---

(a) 1 Lord Raym. 480.



1817.  
 DEANE  
 v.  
 CLAYTON.

against the defendant, a constable, for illegally billeting a dragoon on the plaintiff, and forcing the plaintiff to find meat, drink, and lodging for him; the special verdict found, that the plaintiff kept a house at *Epsom* for those who came there for the air, and to drink the waters there, and sold small beer to his lodgers, and that the defendant had billeted a dragoon, and that the dragoon forced the plaintiff to find the meat, &c. It was objected for the defendant, that there was a variance between the fact in the verdict, and in the declaration.—Lord *Holt* said, ‘at common law, if a man does an unlawful act, he shall be answerable for the consequences of it, especially where, as in this case, the act was done with intent that consequential damage should ensue.’—There are cases, however, where intention is essential in fact; an instance of which is of modern date, *Jefferies v. Duncombe* (a). In this case the defendant had erected and placed a lamp in the front of, and near adjoining to the plaintiff’s house, and kept it lighted there in the day-time, meaning thereby to mark out the plaintiff’s house as a house of ill fame. It was objected at *nisi prius*, that this was not actionable. It was holden by Lord *Ellenborough* to be so, and the court afterwards sustained the action. Here the act, by itself, would not have been unlawful as against any individual, but the intent of doing so to the injury of the plaintiff made it so. In the present case, the fixing and screwing the spears are not the cause of action; but the doing it with intent to wound and destroy all dogs which should come on the defendant’s land in pursuit of hares there, and thereby destroying the plaintiff’s dog, in the manner stated in the special verdict. He has done that which was calculated to kill and de-

---

(a) 11 *East*, 226.

stroy every dog which followed a hare from other lands into the defendant's woodland, as well as dogs which should come immediately into his woodland for the purpose of finding and pursuing hares there. I am of opinion that was unlawful in general, and more particularly so as against Mr. *Townsend* and the plaintiff, who must, I think, be deemed to be his representative. In pursuing this subject, it is fit to consider what the respective rights of the defendant, and Mr. *Townsend*, were. Each had the same species of property in his respective woodland. Each might use his land for taking game found therein for food, or pursue it for pleasure. Each might have separated and divided his land from the other by impassable bounds; but they elect to occupy their respective property, divided only by a bank or mound of earth and a shallow ditch, not being a sufficient fence to prevent dogs from passing from the one to the other. The defendant says, that merely in respect of his possession, he may, for preserving that property which he has *ratione soli*, place these instruments in his lands for the destruction of all dogs coming there in pursuit of hares. If so, it must be admitted that Mr. *Townsend* may do the same. If this was done on both sides, this would render the property to be preserved by these means of no use, for neither could enjoy it without the certain destruction of the dogs used as the means of enjoyment. I cannot conceive that this can be a rational or legal use of property. I think neither of them can do this, for he who on either side pursued the hares from the one woodland to the other woodland would be a mere trespasser, by the entry of himself and dog, or of his dog only, if encouraged to go there by him, for which injuries the law has provided, as I have before suggested, ample remedies. The case of a person having land adjoining the land of another, and putting cattle on his land which wander into the

1817.

DEANE

v.

CLAYTON.

1817.  
 DEANE  
 v.  
 CLAYTON.

other's, was mentioned at the bar, in order to shew that a trespass would be thereby committed, of which no one could ever doubt, because there it is the duty of the owner of the cattle to watch and guard them.—It is possible to do this, and therefore he must do it; and not having done this, he is a trespasser. I do not see how this advances the defendant's case. The case of persons having common by reason of vicinage is much more like the present. There, each of the owners of the respective common or waste may enclose, but neither does; and the persons having right of common on the respective commons or wastes turn thereon their cattle; these cattle wander from the one common to the other, yet no action of trespass lies. Why? because it is a matter of mutual convenience, and to require the commoners on either side to watch their cattle and keep them on their respective commons would be to require a thing to be performed which man is incapable of doing. How are the defendant and Mr. *Townsend* situated?—The defendant, *ratione soli* of his woodland, and Mr. *Townsend*, *ratione soli* of his woodland, had a species of property in the hares on their soil.—This appears to be the settled doctrine from the case of *Sutton v. Moody* (a), and *Churchward v. Studdy* (b). It is fit to mention here, that if the hare which was started by the plaintiff on Mr. *Townsend*'s land, had been killed by the dog, the property would have been vested in the plaintiff, or in Mr. *Townsend*. This is manifest from the authorities I have referred to. It is now contended, by the defendant, that one having this species of property may do, for the preservation of it, acts which he cannot legally do for the prevention of trespasses on his soil, by reason whereof

---

(a) 1 Lord Raym. 250, S. C. 1 Com. Rep. 24.—(b) 14 East, 249.

he has this qualified transient property. I am of opinion, that neither for the purpose of preserving game, nor for the prevention of ordinary trespasses, can the occupier of the soil lawfully place engines, or machines, for the purpose of preserving or protecting such property, with intent thereby to kill or wound the dog used by its owner, who uses it on the land, or to do personal injury to the owner himself. But the plaintiff was not even a trespasser, nor was he in default. It is a well known principle of the common law, that it does not require of any man to do impossibilities.—In the present case, it cannot be urged, that the plaintiff was not lawfully on Mr. *Townsend's* land, in lawful exercise of Mr. *Townsend's* rights, by his licence and with his authority. If the plaintiff has done wrong to the defendant, or was guilty of any default, when did either of these things commence? Was it when he entered Mr. *Townsend's* land?—was it when he was sporting there? Neither of these things can be urged. Was it when the hare was started, and was pursuing its own course towards the defendant's land before the dog pursued it? That cannot be said, for over the hare the plaintiff had no control. Was it when the dog pursued her? No; for the verdict says, that the plaintiff endeavoured, as much as in him lay, to prevent his dog from pursuing the hare into the defendant's woodland, but was unable so to do. Yet it is urged at the bar, that notwithstanding the situation of the properties of these gentlemen; notwithstanding the plaintiff's exercise of a lawful right under Mr. *Townsend*; notwithstanding his utmost endeavour to prevent his dog from going into the defendant's woodland; notwithstanding he is neither a trespasser nor defaulter, he is to have no satisfaction for the loss of his property, destroyed by the acts of the defendant, calculated and intentionally planned to destroy all dogs that should come into his woodland in

1817.  
*DEANE*  
 v.  
*CLAYTON.*

1817.  
 DEANE  
 v.  
 CLAYTON.

pursuit of hares; and this too, a case where the dog pursued a hare in which the defendant had no interest *ratione soli* at the time. Here I think it proper to take notice of the case of *Blythe v. Topham* (a), cited for the purpose of shewing that it was the default of the plaintiff. The declaration stated, that the defendant dug a pit in his common, by means whereof the plaintiff's mare having strayed, fell into it, and perished.—This was held to be naught, for when the mare was straying, and the plaintiff shews not any right why it should be there, the digging of the pit was lawful, as against him. I answer to this, that for any thing that appears to the contrary, *First*, the digging this pit was lawful, as against every body. It might have been a gravel-pit or chalk-pit, dug in the ordinary use of the soil. *Secondly*, there is no intention to produce damage to any one stated or suggested in that case. *Thirdly*, the default was wholly in the plaintiff in permitting his mare to stray. If this had been held to be actionable, a man could not use his own land; he could not procure chalk, &c. for the manure of his land, without peril of being ruined by the neglect of others. How then can this case be assimilated to the defendant's case, who intentionally places these sharp instruments to produce the mischief he has effected, and without any statement on the record, that this was a means necessary for the preservation of his hares, and without which they could not be preserved? For these reasons, I say, that the acts of the defendant, stated in the special verdict, were unlawful; and that the plaintiff having sustained an injury thereby, without any default in him, is entitled to maintain this action.

My second proposition is, that if the plaintiff had been a trespasser, or otherwise in default by the entry

---

(a) Cro. Jac. 158.

of his dog into the defendant's premises, as stated in the special verdict, the defendant could not in any manner have justified the direct killing of the dog. This proposition scarcely requires any authority; common sense is against it. Every lawyer knows that the law has provided ample remedies for such injuries, a remedy *in rem*, where the thing doing the damage can be taken, and this secures a satisfaction; but in that case the party cannot kill, injure, or otherwise use the distress, than for its preservation, as milking a cow. It has also provided a remedy *in personam* by action, where the thing doing the injury for any cause cannot be distrained. But there are authorities on this head which are most important: I consider the case of *Beckwith v. Shordike*, and another (a), as a strong authority to this effect, notwithstanding the result of the peculiar case. That was an action of trespass, for entering the plaintiff's close with guns and dogs, and killing his deer. The defendant pleaded not guilty; the jury found him guilty, and gave thirty shillings damages.—A motion was made to set aside the verdict. The judge who tried the cause was of opinion that the jury ought not to have found the defendants guilty; it being an accident, that happened without their intention, and against the inclination of the defendant. The court said, that those cases must depend very much upon the particular circumstances appearing in evidence; whether the persons who owned the dog which in the ircompany did the mischief were or were not trespassers. The jury were to judge *quo animo* they entered the close. The court said that the judge, though he might think otherwise, did not direct them which way to find their verdict, but left it to them.—Lord

1817.  
  
 DEANE  
 v.  
 CLAYTON.

---

(a) 4 Burr. 2092.

1817.  
 DEANE  
 v.  
 GLAYTON.

*Mansfield.*—The damages are so small, that it is not worth while to set aside the verdict on payment of costs. The play would not be worth the candle. This case supports my first proposition; but I did not mention it before, thinking it well introduces a case in which the doctrine laid down by the court is in point on this head, I mean the case of *Vere* against Lord *Cawdor* and *King* (a). Trespass for shooting and killing the plaintiff's dog.—The defendants pleaded the general issue. The defendant *King* pleaded specially, that Lord *Cawdor* was possessed of a close, part of his manor of *Kidwelly*, of which he was lord, and that the defendant *King* was game-keeper of the manor, duly appointed to preserve the game upon the said manor; that the plaintiff's dog was in the close of the said Lord *Cawdor*, being part of his said manor, running after, chasing, and hunting hares there, and that the defendant *King*, being game-keeper, for the preservation of the said hares, shot and killed the dog. To this plea there was a demurrer. Here was no attempt to put a plea on the record of a justification in respect of the possession: but the case is put on a much more rational ground, a justification under the *Game Law*. The language of Lord *Ellenborough* applies most forcibly to the proposition I am now maintaining. His lordship says, 'The question is, whether the plaintiff's dog incurred the penalty of death for running after a hare in another's ground; and if there be any precedent of that sort, which outrages all reason and sense, it is of no authority to govern other cases. There is no question here as to the right of the game. The game-keeper had no right to kill the plaintiff's dog for following it: the plea does not even state, that the hare was

---

(a) 11 *East*, 568.

put in peril, so as to induce the necessity of killing the dog, in order to save the hare.' Here the defendant was clothed with all the exclusive powers vested in him as game-keeper, under the system of laws, called the *Game-Laws*; and yet the action was maintained by the court of *King's Bench* against him, and his plea was held to be bad. Suppose, in this case, the defendant had shot the plaintiff's dog, what defence could the defendant have put on the record? His plea could only have been that he was possessed of a close, called the *Woodland*, in which there were hares, that the plaintiff's dog followed a hare from Mr. *Townsend's* close, and he, the defendant, to preserve that hare, shot the dog. This is the case on the record. On demurrer, such a plea must have been held to be bad.

1817.  
  
 DEAK  
 v.  
 CLAYTON.

The third and last proposition I have to state is, that the defendant cannot justify killing the dog indirectly, if he could not have justified the doing it directly. In support of this proposition, I need only resort to the store-house of wisdom, the common law of *England*. There I find it written in plain terms, that *Quando aliquid prohibetur ex directo, prohibetur et per obliquum* (a). The law, I contend, forbids the killing of the dog directly for a mere trespass. The defendant is not justified in doing that by indirect means, which he could not lawfully do by direct means. Other cases were cited at the bar besides those I have mentioned; I have read and considered them, but have particularly referred only to such as in my judgment bear materially on the question before the court.

If I still find that the court is divided on the question, thinking it, as I do, a matter of great importance to the public, and to be a case that ought to be decided the

---

(a) *Wingate*, 680.



1817.  
 ~~~~~  
 DEANE  
 v.  
 GLAYTON.

one way or the other, I shall decline giving my judgment on this occasion, that the party may have the judgment of this court re-considered in another.—I add this for the good of all who hear me. I counsel them to abstain from acts of this kind; and though these acts are usually done for the preservation of the game, I recommend to them to consult their lawyers, and trace all similar acts to their consequences, as they may affect the life of man, before they venture to repeat them.

Mr. Justice PARK.—The facts of this case, as alleged in the first count of the declaration, and as found by the jury, have been so fully stated by my brother *Burroughs*, that I need not repeat the formal part; but the material facts, as found by the special verdict, when stripped of all technical language, are these: That a large tract of woodland, belonging to the defendant, adjoined upon a piece of woodland, belonging to a gentleman, of the name of *Townsend*, separated only by a low bank or mound of earth and a shallow ditch; but *not being a sufficient fence to prevent dogs from passing from the one woodland to the other*:

That through the defendant's woodland there were public foot-paths, not fenced off from the rest of the land: That the defendant, *for the preservation of hares in his woodland*, and to prevent them from being killed by dogs and foxes, did, *for the purpose of wounding and killing dogs and foxes* that might come into his woodland in pursuit of hares, cause *several iron spikes, called dog-spears*, to be screwed and fastened into several of the trees in the woodland, and did also, *for the same purpose*, keep those spears fastened over the hare-paths, and they were *purposely placed at such a height* as to allow a hare to pass under them without injury, but to *wound and kill a dog* that might happen to come against one of the sharp ends, and the *spikes being adapted to effect the said purpose*:

That none of the spikes were at a less distance than fifty yards from the public foot-path; others at a much greater; namely, one hundred and fifty, or one hundred and sixty yards:

1817.  
DEANE  
v.  
CLAYTON.

That the defendant had caused notices to be painted on boards, at the outside of his premises, 'Take notice, that steel-traps, spring-guns, and *dog-spikes* are set in these woods and premises:'

That the plaintiff, by the consent and permission of Mr. *Townsend*, went into the woodland belonging to Mr. *Townsend* for the purpose of sporting, accompanied by a pointer dog; that a hare rose in Mr. *Townsend's* grounds, and was seen and pursued by the plaintiff's dog, over the mound into the defendant's woodland, and ran against one of the sharp ends of the spikes, and was thereby killed:

That the plaintiff endeavoured, as much as in him lay, to prevent the dog from pursuing the hare into the defendant's woodland, but was unable to do so.

These are the facts; and the question is, whether the plaintiff can, under these circumstances, maintain an action on the case for the value of his dog. I am of opinion that he may; and knowing from what ability and authority I differ, I cannot but deliver that opinion with great diffidence, though I honestly entertain it. After the most mature deliberation and consideration of all the cases, some things are clear. No trespass has been committed in this case. The act of the dog was not a trespass.—No action of trespass would lie against the owner, unless he had incited the dog; the contrary was the case, for it expressly appears, that he was lawfully using his dog under the authority of the owner of the ground where he was sporting, and when the dog escaped, instantly endeavoured to restrain and call him back.

The distinction between voluntary and involuntary acts, which constitute a trespass in the one case, and not

1817.  
 DEANE  
 v.  
 CLAYTON.

in the other, is well taken in *Millen v. Powdrey*, best reported in *Popham* under the name of *Millen v. Harvey* (a), and *Beckwith v. Shordike* and another (b).

But it was said at the bar, this dog was an intruder, and was there without licence. I do not know what intrusion is, as applied to this subject matter; at all events, it cannot be a stronger act than a trespass. I have shewn that this was not a trespass; and I shall presently endeavour to shew that even if it were a trespass, the defendant would not have been warranted, under the circumstances, in doing what he did; *a fortiori*, if it was an involuntary act, and one which the plaintiff did all in his power to prevent.

Another point I take to be clear, that if an actual trespass had been committed by horses, sheep, or other cattle, which the owner is bound so to keep as to prevent them from trespassing, the owner of the ground could not have killed the animal *directly*, unless it became necessary to do so, in order to prevent the actual destruction of some of his own property; such a direct act of killing would have been an act of trespass. For this, the case of *Vere v. Lord Cawdor* (c), is an express authority; and the opinion of Lord Ellenborough is so strong to this case, that I must occupy some little time in stating it (d).

That was an action of trespass, because the killing was *direct*.—Here, the fixing the spikes in the defendant's own ground could not be of itself a trespass; but it is the consequence of the act of which the plaintiff complains, and when the defendant fixed the spikes he must be considered as having contemplated the *probable* consequences of his own acts. Indeed, this special verdict does not leave any doubt on this point, for it is found

---

(a) *Poph.* 161. *S. C. Latch.* 13.—(b) 4 *Burr.* 2092.—  
 (c) 11 *E.* 568.—(d) Here the learned judge stated the case as Mr. Justice *Burrough* has done *ante*, p. 218, 219.

that these spikes were placed there for *the purpose* of wounding and *killing* dogs.

I assume it as another clear proposition, that under the circumstances, the hare in question was not the property of the defendant; and, therefore, it was not necessary to kill this dog for the protection of the defendant's property, for it was admitted at the bar, that if the hare had been killed in the defendant's ground, it could not have been his. Indeed this has been decided in many cases, in *Sutton v. Moody* (a). If A. start a hare in the ground of B. and hunt it into the ground of C. and kill it there, the property is in A., the hunter.—This is stated as text law, in 2 *Black. Com.* (b), and finally confirmed in *Churchward v. Studdy* (c). It must be admitted then, upon these authorities, that as there was no voluntary trespass, as there was no property of the defendant's own to protect, that neither the defendant nor his servant could have stood there with a gun and shot this dog in pursuit of the hare. Why?—Because it is said at the bar a man ought to exercise a discretion. I have ever thought it quite clear that no man shall do that *indirectly*, which he cannot do *directly*.—The placing these dog-spears for the *express purpose of killing* is, as it appears to me, just the same as if the defendant had placed a man there for the purpose of *shooting*:—nay, it is worse, for in the one case, a man would exercise a discretion; but here death must inevitably ensue, without any discretion being possible to be exercised, without any regard to circumstances, and without giving the opportunity of knowing what the circumstances might require. If then, an actual trespass on the ground would not justify the destruction of this animal, without some apparent necessity, to preserve the defendant's own property from destruction; how can it be justified by that which was not a trespass, nor even

1817.  
DEANE  
v.  
CLAYTON.

---

(a) 1 Lord Raym. 250.—(b) 419.—(c) 14 East, 249.

1817.  
 DEANE  
 v.  
 CLAYTON.

the subject of an action on the case?—The dog cannot be said to be an intruder, for the defendant had taken no means to prevent dogs from coming into his land; for it is expressly found, by the verdict, that the mound and ditch were *not a sufficient fence* to prevent dogs from passing from the one woodland into the other, and Mr. Justice Doddridge, in the case in *Popham*, mentions there being no fence, as a circumstance worthy of observation. Indeed, from the placing these spears, as it is found, for the purpose of destroying dogs, it is evident they were expected to come; and knowing the roving disposition of a dog, which, as some of the cases state, *cannot be ruled suddenly*, the law has provided, that the act of the dog shall not make the owner a trespasser, unless he has incited the dog to do the particular act. Even an action on the case will not lie against the owner for a mischief committed by a dog, unless it be alleged that the dog had the vicious propensity to bite, or to do the sort of act complained of; and also the owner's knowledge of the animal having that propensity. But here the animal only followed his natural bent; and it must ever be remembered, in this argument, that the hare did not belong to the defendant. A case from *Cro. Jac. of Blythe v. Topham*, has been much pressed by my brother Bosanquet. The same case is mentioned in *Vol. Abr. (a)* and is there more fully stated. If *A.*, seised of a waste adjoining to a highway, dig a pit in the waste within thirty-six feet thereof, and the mare of *B.* escape into the waste, and fall into the pit and die there, yet *B.* shall not have an action against *A.*; for his making the pit in the waste, and not in the highway, was *not any wrong* to *B.*, but it *was the fault of B.* himself, that his mare escaped into the waste. It is sufficient to observe, that two most material facts

---

(a) 1. 88, pla. 4.

are found in this case, which are not existing in those in *Roll. & Cro. Jac.* namely, that *B.* is there stated to be himself *the faulty person in suffering his mare to escape.*—Now here it is found, that the plaintiff endeavoured, as much as in him lay, to prevent his dog from going on defendant's land, but in vain. A man may, and easily can, control his horse, but he cannot control his dog. All the cases in the law which oppose such an action in the plaintiff, go upon the ground that he has not used *ordinary* caution. But the case in *Roll.* differs from this at the bar, in another most material respect, *viz.* That it is not found that the pit was dug *for the purpose of killing mares.* If it had, and had been decided for the defendant, I then, should have thought it a strong authority; but as it stands, I do not feel the weight of it.—A case of *Brock v. Capeland (a)* was also quoted for an opinion of Lord *Kenyon*; but it is to be observed, that the decision of the learned Chief Justice turned expressly upon this, that the defendant had properly let loose the dog, and the injury had arisen from the plaintiff's *own fault*, in going *incautiously* into the defendant's yard after *it had been shut up.* But the latter part of what Lord *Kenyon* states, with regard to what had happened before him and the whole court in another case, shews to my mind most manifestly, that had his Lordship had a similar case to this before him, he would have been clearly for the plaintiff.

In an action against a man for keeping a mischievous bull that had hurt the plaintiff, it having appeared in evidence that the plaintiff was crossing a field of the defendant's where the bull was kept, and where he had received the injury; the defendant's counsel contended, that the plaintiff having gone there of his own head, and having

1817.  
DEANE  
v.  
CLATTON.

---

(a) 1 *Esp.* 207.

1817.  
DEANE  
v.  
CLAYTON.

received that injury from his own fault, the action would not lie; but it appearing also in evidence that there was a contest concerning a right of way over the field wherein the bull was kept, and that the defendant had permitted several persons to go over it as an open way, Lord *Kenyon*, Chief Justice, had ruled in that case, and the court of *King's Bench* had concurred in opinion with him, that the plaintiff having gone into the field supposing that he had a right to go there, and the defendant having permitted persons to go there, as over a legal way, he should not then be allowed to set up in his defence the right of keeping such an animal there as in his own close, but that the action was maintainable.

The case of *Butterfield v. Forrester* (a) seems to me to be an authority for the doctrine I am maintaining. It was an action on the case. A man repairing his house at the end of a town, had put up a pole across this part of the road, a free passage being left by another branch or street in the same direction. This erection therefore was not put up to cause, but to prevent mischief. The plaintiff, riding unusually hard through the streets of *Derby*, did not see this obstruction (though he might have seen it a hundred yards off), rode against it, fell with his horse, and was much hurt.

The jury found for the defendant, and the court confirmed the finding: Lord *Ellenborough* saying, amongst other observations, that two things must concur to support this action; an obstruction in the road by the fault of the defendant, and no want of ordinary care to avoid it on the part of the plaintiff. Here those two things do concur, the wilful erection of these spears by the defendant, for an unlawful purpose, viz. to kill

---

(a) 11 E. R. 60.

*dogs*, and no want of ordinary care in the plaintiff, for he did all he could to control his dog, but in vain. If the defendant is warranted in putting these spikes where he did, he might equally have done so, if his wood had run along the high road, and no mound or fence between but such as that in question, for the distance can make no difference. The sort of protection therefore which the defendant has resorted to for the prevention of that which at the most is a trespass, might have been fatal to human life; and when we are weighing whether a thing can be done or not, all the consequences of such an action must be looked to.

If, upon this special verdict, it had been found that there was fault or blame in the plaintiff, the case might have been different; and this notion of fault in the plaintiff, I have shewn to be a considerable feature to guide the decision of the cause; and my brother *Best*, feeling the importance of such a fact, wished to make out negligence or misconduct in the plaintiff. But I did not hear him state one fact to that end; he said the plaintiff had notice, and therefore it was his own fault. It is true, he was aware of the notice, and so far from being in fault, he does all he can to comply with it; for, having a right to be where he was, and his dog having roused the hare and pursued her, the plaintiff *endeavoured*, as much as in him lay, to prevent the dog *from pursuing the hare, but was unable to do so*. What could the plaintiff do more, except never going out of his house into his own or his friend's ground with his dog? But the defendant might have done more, for if he chose to put up these spikes, he ought to have made the approach to his land more inaccessible by putting up fences, where so much inevitable damage lurked. Here then is a temporal loss, or damage sustained by the plaintiff, as the *immediate and contemplated consequence of the act of the defendant*.

1817.

DEANE  
v.  
CLAYTON.



1817.  
  
 DEANE  
 v.  
 CLAYTON.

It may be true, that a similar action *in specie* is not to be found in any law-book, and I admit that if the case were new in principle, it would be necessary to apply to the legislature, and not to a court of law. But where the case is only new in the instance, and the question is upon the application of a principle recognized in the law to such new case, it will be just as competent to courts of justice to apply the principle to a case which may arise two centuries hence, as it was two centuries ago. This is the very nature of an action on the case. Here is a temporal loss or damage sustained by the plaintiff, who has done no wrong, and who used every degree of caution and exertion to avert it by the tortious act of the defendant, who must take the consequence if his neighbour thereby sustain an injury.

The two things here concur, which Lord *Ellenborough* requires to support such an action, *fault* in the defendant, and no want of *ordinary care* to avoid it on the part of the plaintiff.

For these reasons I am of opinion that the plaintiff is entitled to recover.

Mr. Justice DALLAS.—It has been admitted at the bar, that this case is in point of circumstances altogether new, and therefore the argument has properly proceeded on general principles and analogies real or supposed.

The question is, whether, under the facts found by this special verdict, the defendant had a right to place the dog-spears in the manner and for the purposes for which they are found to have been placed, whereby, and as a consequence to be foreseen, the dog of the plaintiff has been killed, and for the loss of which the action has been brought.

And, *first*, with respect to the alleged inhumanity of the proceeding, which has been adverted to at the bar,

and may weigh, with many persons, on the first view of the subject; it is not disputed, that in some cases, a dog may be killed for the preservation of a hare. In that cited at the bar, of a dog found in a warren, this was expressly decided; yet, in point of humanity, where is the difference, between destroying a dog in a warren, or in a cover for the preservation of game? It will be no answer to say, that a warren is a privileged place; for whether privileged or not, or whether game be property in one place, and not in another, though this may furnish a distinction applicable to the case, in other respects, it can make no difference on the present view of it.

With respect to the particular mode of destruction, though this may be of fit moral consideration, it can scarcely be contended, that the law will distinguish permitting a dog to be destroyed in one way, and yet forbidding it in another.

The question is upon the right to destroy, and not upon the mode of destruction; as to which, subject to be judged of by others, every man must judge for himself.

It has also been stated, that nothing appearing to the contrary, it is to be presumed, the plaintiff was qualified: to this I cannot agree, for if the fact were material, it should have been found one way or another.

But in my view of the subject it is of no consequence, for if qualified, he could have no right to trespass on the defendant's ground; and if unqualified, the defendant could have no right beyond seizing the dog, supposing he had by himself, or his servant, been present at the time.—As little can depend on the circumstance that the plaintiff was sporting with the permission of the owner of the land on which the hare was started, for this could only be a licence as to the land of such owner, and could give no right to go upon neighbouring land, belonging to a different person. Nor can the distinction between

1817.  
DEANE  
v.  
CLAYTON.

1817.  
DEANE  
v.  
CLAYTON.

wilful and involuntary trespass make any difference in this respect : for the question has been argued on ground applicable to the one, as well as to the other, *viz.* That, whether the trespass be voluntary or involuntary, the party thereby injured had no right to act as the defendant has done. It has further been stated, that there were different paths going through this wood : but this, also, appears to me to make no difference, for, as to the plaintiff, he was not in the exercise of any right of way, much less within the limits of such way ; but on the contrary, professing to have been involuntary on the land in question ; and if this had been the case of a person exercising the right of way, it is found, that not one of these dogspears was placed at a less distance than fifty yards from any path, and most of them at the distance of one hundred and fifty ; so that if the injury had occurred in the exercise of any such right, the case would depend on very different considerations.

In effect, according to the range the argument has taken, nothing will turn on whether it be a close, or preserve with a right of way through it ; for in the one case as in the other, it has been contended, it would be illegal to place instruments of this description. Nor do I think it requisite, in this case, to consider how far, and under what circumstances, game is to be treated as property, and to what effect : for here, again, the argument in support of the plaintiff's case does not depend on this distinction ; but it is maintained that even though for the preservation of that which is admitted to be property, as herbage, underwood, fruits of the surface, soil itself, or whatever as property will form the subject of trespass, still what has been done in this case was unlawfully done, and the plaintiff is entitled to recover.

One other point only remains, before I come to the question itself, which is, how far the present decision

will apply to measures that may, by direct operation, or necessary consequence, affect human life.—As to this, I will only observe, such cases seem to me to depend on different grounds; the law distinguishing to many and most essential purposes between property and the life of man; and to the facts of this case only my present opinion is intended to apply.

I shall now shortly advert to the cases cited.—And the first class goes to distinguish between voluntary and involuntary trespass, as in the instance of cattle passing along the road and consuming grass and corn, or the dog chasing sheep, and other cases of the same description, the owner doing all in his power to prevent it. To the doctrine and to the authority of all such cases I fully subscribe, and if this action had been trespass against the present plaintiff, by the present defendant, the former might have defended himself on the facts found by this special verdict; but whether an action of a description precisely opposite, that is, an action brought against the owner of land for damage sustained by a party having no right to be there, for an use made of the land by the owner, and being therefore there only under circumstances, to make it excusable trespass, such damage being induced altogether by his own act, whether voluntary or not, whether such action will lie, is a question altogether different.

Suppose, the trespass being voluntary, an action will lie; it will scarcely be contended, that being involuntary, though this might excuse the party, it would give him a right of action against the owner of the soil for a damage, though resulting from an involuntary act.—The case would have been in point, if the dog chasing the sheep or hare had been injured in such chase, and for the mischief incurred an action had been brought; but no such case has been cited, and it must be admitted that this

1817.  
DEANE  
v.  
CLAYTON.

1817.

DEANE

v.

CLAYTON.

action is a perfect novelty, though, with more or less of extent, this, and similar practices, have long and notoriously prevailed.

To the next class of decisions I also equally accede; namely, those which establish that you shall do no more than the necessity of the case requires, when the excess may in any way be injurious to another,—a principle which pervades every part of the law of *England*, criminal as well as civil; and, indeed, belongs to all law that is founded on reason and natural equity. It would be superfluous to advert to particular instances.

Admitting, therefore, the authority of these cases, but denying their application, it will not be necessary to follow them in detail; and I shall come at once to the ground on which it seems to me they are to be distinguished from the present; and it is this: they all turn on the fact of presence. Such was the case in which the defendant pleaded that he killed the plaintiff's dog, to preserve his own: the plea was held bad, because it did not allege that his own dog could not be otherwise saved. And so in *Vere v. Lord Cowdor*, because it was not averred that it was necessary to kill the dog for the preservation of the hare. So in the case of nets, they might have been detained without being destroyed. Or, as it was properly put in the argument at the bar, where the owner of the property is present, and has the means of preservation in his own hand, he is bound to exercise his judgment, and not do more than is immediately necessary; but it does not follow from this, that he may not take measures for the general preservation of his rights during his absence, the nature of which must depend upon considerations altogether different: all such cases are, for these reasons, to be distinguished, as it seems to me, from the present.

It is contended, however, that they apply; and if you may not kill a dog by your own immediate act or order,

neither can you by means provide it to induce such consequence when not personally present; for what, it is asked, is the difference between killing with your own hand with an instrument therein at the time, or by an instrument placed by that hand on the ground for the future purpose? That which it is unlawful to do by direct means, it is equally unlawful to do by indirect means, and to this point the case of *Vere v. Lord Cawdor* is cited.

But here, again, it appears to me, there is a misapplication of principle. It is illegal to place spikes or glass upon a wall, and if a party climbing over be thereby wounded or cut, can he bring an action? And yet if I were to see a trespasser coming down my area, or getting over the garden wall, I could not drive the spike into his hand, or cut him with the glass? Or, to bring it home to the present case, suppose that in order to separate his property from that of his neighbour, the defendant had erected a wall, and put spikes or glass on it, and that the plaintiff had been wounded in attempting to get over, could this action have been maintained? If not, where is the distinction between spikes on the ground, with notice that they are there, or notice given by the visibility of the spikes themselves, with respect to the owner of the dog? Certainly none; and for the conduct of the dog, the owner is responsible; if not to the extent of giving an action against himself in a case where all is done that could be done to restrain the dog; yet, at least, to exempt the owner of the soil from an action for an injury done to the dog.—But if the owner had taken his station on the wall, he could not, in person, have made use of the glass or spikes; the doctrine depends on a broad distinction.—Presence, in its very nature, is more or less protection; absence is abandonment and dereliction for the time; presence may supply means, and limit what it supplies; but if, during absence, pro-

1817.

DRANE  
v.

CLAYTON.

1817.  
 DEANE  
 v.  
 CLAYTON.

perty can only be protected by such means as may be resorted to in the case of presence, all property lying open to inroad can have no protection, at least by any act of the party himself; for to say that he can only be protected, when absent, by such means as he could use if present, is a contradiction in the nature of things. But it is further said, you shall make such use of your own property as not to injure that of another; and to this also I agree, in the true sense of the maxim which is the right of another; for if, in breach of this rule, my right be invaded by another, what is done by me, if only adequate to repel such invasion, is not an infringement of his right, but the defence of my own, and must turn on the consideration on what depends such rights as I am permitted by law to do.

On this foundation stands the whole law of actions on the case for consequential damage, and the doctrine of nuisances, as it may affect individuals or the public, in all its varieties of form.

The difference is between absolute and relative rights, between that which is mine, exclusive of any right in others present or future, and that which is of a spreading shifting possession, as air, water, &c. in which I have but a qualified possession, a possession subservient to the future use by others.

If I place a log across a public path, and an injury be thereby sustained, the soil being my own, but the public or individuals having a right of way over it, an action will lie, because there is a right in others to pass along without interruption; but if there be no right of way, I may with any view, and for any purpose, place logs on my own land, and a party having no right to be there, and sustaining damage by his own trespass, cannot bring an action for the damage so sustained.

So in the case put of a ditch, I may not dig it so as to

interfere with any public or private right; but within the limit of my own property adjoining a common, and not separated from it by any actual fence, I may dig a ditch, however wide, and man or beast sustaining harm, having no right to be there, no action will lie. Such was the case as cited of the horse straying from the common and falling into the pit, and in which it was determined that no action would lie; *first*, because the owner had a right to do what he pleased with his own land, and next that the plaintiff could shew no right for the horse to be there. And yet that a horse might, in the night or day, stray from an open common into an adjoining land, not separated by any fence, was as a probable consequence as much to be foreseen, as that a hare might spring up and a dog chase, or if the horse had escaped from the owner, and he had sustained damage in the pursuit, would that have given him a right to damages for the consequence of an escape which he ought in strictness to have prevented?—I may not keep a mischievous bull in a field through which there is a right of way, but when there is no right of way, I am entitled to do so, as was stated by Lord *Kenyon* in one of the cases cited at the bar, and this by way of illustration, for the very purpose of shewing the distinction in question.

The only case cited on this part of the subject, as bearing the other way, is that of *Townsbend v. Watber*, but in facts and circumstances it has no resemblance to the present. The object in the former was to attract, in order to destroy the dog; and in this the immediate purpose was, to keep the dog from a situation in which he might incur destruction.

In *Townsbend v. Watber*, the enticement was made to operate beyond the line of the defendant's property, and to the destruction of the dog, where the dog had a right to be, and this enticement constituted the foundation of

1817.  
 DEANE  
 v.  
 CLAYTON.



1817.  
DEANE.  
v.  
CLAYTON.

the action; it is in effect but the common case of nuisance. But no decision has established that a trap, placed by a man in his own land, and not calculated to operate so as to allure beyond, or even within the limit of such land, would be a trap unlawfully placed. But it has been argued that the principle of the case at least applies in this way, that though the enticement be not the direct act of the party, yet it arises of necessity from the act done; as for instance, that a hare lying near the hedge of a highway, forming one side of a woodland in which spears are put, may operate to entice a dog passing along the highway, and this I admit may happen. But if the owner of land have a right to game upon his land, and a right which he undoubtedly has to a certain degree, whether a hare shall lie in one place or another is that which, generally speaking, he can neither cause nor control, and being incident to the common and ordinary enjoyment of land, is that to which others must submit, incurring only the duty of restraining dogs, which, in numberless instances, I conceive they are bound to do. But take it the other way, if a wilful trespasser (and to this the argument goes,) may bring an action for loss or damage sustained by his own trespass, he may beat the cover of every man of landed property in the neighbourhood, and bring an action for his dog if killed or maimed, in the way, at least in which the case has been argued; nor will it be any answer to say that an action of trespass might be brought against him, for though the event of each action might be different, as to damages; still, in point of principle, it leaves the objection the same. But here again, I would ask, is the line to be drawn? Suppose dog-spears, planted at a distance from any road, in a preserve surrounded on all sides by land belonging to the owner, and to an extent to render attraction or enticement impossible by the

game lying in such preserve, will it be said that in such a case an action would lie? The argument, not indeed in words, but unless I mistake it, in effect, goes to this extent; you may traverse field after field, and add trespass to trespass, for the purpose of getting to insulated and protected property;—turn in your dog, follow it yourself, and if one or the other be hurt, bring an action against the owner for the damage sustained. The argument, I say, proceeds to this extent; for though, in this case, the dog was endeavoured to be restrained; yet the doctrine goes to the general illegality of placing such spikes under any circumstances, nor has it been limited by the distinction between voluntary and involuntary trespass.—With the greatest possible respect for the different opinions entertained, to this I cannot agree.

I have likewise attended to the argument, but in vain, to learn where, in cases of this description, the doctrine is to stop. It is meant to be laid down, that no trap may be placed for the destruction of vermin of any description; for in every such trap a dog may be maimed, if not killed; and if so, how does such a case differ from the present? If the owner may bring an action for one sort of injury, the consequence of trespass on his part, why not for another? If for killing, by a dog-spear, why not for maiming by a trap? The cases differ not in kind, but in degree; and on the ground taken in the argument I do not see why every trap, for whatever purpose set, by which a dog may be killed or maimed, will not subject the owner of the land to an action; and traps are equally set against vermin for the preservation of game, as appeared, indeed, from the facts found by the present verdict.

Finding then no case in which such action has ever been brought, nor any instance of an indictment for a nuisance, which this would be, if the argument for the

1817.  
DEANE  
v.  
CLAYTON.

1817.  
 DEANE  
 v.  
 CLAYTON.

plaintiff be well founded in its extent, nor any precedent of such an indictment in any book, though the practice in various forms is of extensive prevalence, thinking too, that every analogy resorted to has failed, and that all principle is the other way, I am of opinion on the general ground, that this action cannot be maintained, and I have been anxious to deliver my sentiments fully on this point, that I may not be thought to have declined it, though I think at the same time, there is a narrower ground which would be of itself sufficiently in favour of the defendant.

It is found by the special verdict, that these spears were placed for the destruction of foxes as well as dogs, the purpose in both cases being the preservation of hares. I have not heard it argued, that to destroy a fox is illegal, or that the argument of not shooting the dog, unless to preserve the hare, will apply to the case of a fox. A fox may be undoubtedly destroyed.—In hares every owner of land has a qualified property for the time being in respect of their being on his land. In this all the cases agree. To preserve it by lawful means is a lawful purpose. Suppose, therefore, the special verdict had found, that the spears had been placed for the destruction of foxes only, in order to save hares, would this become unlawful, because by possibility and against the original intent the death of a dog had been induced? Or, is it to depend upon intent? If so, a man has only to place such instrument and give no notice, and there will be no proof of intent: But it seems strange to say that by giving notice he places himself in a worse situation, and this, though done by him in order to place others in a better; that is, in order to save their dogs, for the means, it is true, to save his own game. I have a right to kill a fox, and I intend to protect my game on my land by so doing; but because your dog may be killed, if found where he ought not to be, is my right therefore to cease? This

seems to me extraordinary doctrine. Generally speaking, the party may justify by referring his act to any lawful cause, as in the case of *Crowther v. Ramsbottom* and another (a), in which it was held, and on the authority of many former cases, that in trespass, for breaking and entering the defendant's close and taking his goods, the defendant may justify under a sufficient legal process, if he had it in fact, at the time, although he declared that he entered for another cause, and a case was cited by *Lawrence*, Justice, in which *Holt*, Chief Justice, said, "Suppose one has a legal and illegal warrant, and arrests by virtue of the illegal warrant, yet he may justify by virtue of the legal one, for it is not what he declares, but the authority he has." In this case the verdict finds, that the spears were placed to kill foxes as well as dogs, which, taking it to be a lawful purpose, is one to which the original act, that is, placing the spears may be referred. Being legal in one respect, can it become illegal by that which has been called, in some case, the turning up of the event? Or, upon the doctrine of being taken to intend that which is a probable consequence, is a possible consequence to be inferred or intended in opposition to the primary and immediate intent, such intent being to avert the very consequence, as to which the particular intent is inferred?—Every man is liable for the consequences of an act illegal in itself; but for the consequences of a legal act, such as placing spears for one purpose must be admitted to be, because a consequence follows, which, if it had been the single end and object, it may be taken for the purpose of the argument in this stage of it would have made the act illegal; that under such circumstances an action will lie, is that for which I cannot feel any principle or discover

1817.  
DEANE  
v.  
CLAYTON.

---

(a) 7 T. R. 664.

1817.  
~  
DRANE  
v.  
CLAYTON.

any authority. At any rate, these are anomalies which greatly increase the difficulty, even on the former view of the subject, and add to my embarrassment in deciding for the plaintiff.

The argument of inconvenience has been slightly touched on. It is a fair application, in a new and doubtful case, and consequences have been predicted of injury to the public and individuals from a decision in favour of the defendant. Having already delivered my opinion, too much at length, on the case at large, I will only say, I feel no such alarm myself. The past is in this respect the best security for the future. Practices of this kind, various in their form, but similar in their object, have with reference to the public long and extensively prevailed; yet this is the first instance of an action having been brought. On the whole, I am of opinion, the judgment ought to be for the defendant.

Lord Chief Justice GIBBS.—I have reflected on this question repeatedly; and the respect due to my two learned brothers who first delivered their opinions would incline me strongly to concur with them; but after the fullest consideration, I feel myself obliged to say that I think this action cannot be maintained.

No authority has been cited in support of it; no instance produced in which such an action has before been brought; nor have I heard any legal principle stated on which I think it can rest.

I shall endeavour, in the first place, to remove out of this case an error, which seems to have pervaded most of the plaintiff's argument.

It was assumed that if the plaintiff was not answerable, in trespass, for what his dog did, the act of the dog could not be wrongful against the defendant.

This I take not to be so, whether the plaintiff be

answerable in trespass for the act of his dog or not, the dog was certainly a wrongful aggressor on the defendant's land.—The defendant had an unquestionable right to drive him off, which could not be if he was there by right.

1817.  
DEANE  
v.  
CLAYTON.

Where the owner is not answerable to me for the act of his dog, the dog is to me as an animal without an owner, for whose aggressions no one is answerable; and, therefore, my only remedy is to guard against them.

Having, I hope, established this point, I shall proceed to consider the case upon the general principles of law, and I conceive that as far, at least, as civil rights are concerned, every man may guard his own land from encroachments, by any means he pleases, provided he does not thereby invade or interfere with the legal rights of others.

One mode of guard is, the setting up such defences as will render it dangerous for the animals of others to pass over our land, and if after this they endeavour to pass, without right, it is at the peril of their masters who do not keep them within their own bounds.

What the defendant has done, was done on his own land, and could not molest any other man in the exercise of any legal right.

I cannot think that he was bound to consider the degree of mischief, which those guards so set up on his own land might occasion, either to beasts or dogs that wrongfully encroached upon him.

The wrong is with those, whose dogs are permitted to wander into the defendant's land, and if they suffer by such means as the defendant has used for excluding or stopping all such aggressors, the fault is their own.

The defendant's act, in laying the dog-spears, was harmless, until the plaintiff's dog wrongfully intruded upon him. The hurt which he received is therefore to

1817.  
 DEANE  
 v.  
 CLAYTON.

be referred to his own wrongful intrusion, which was the immediate cause of it.

If the dog had no right to be there, as he certainly had not, his owner cannot complain that he was injured by the defences set up against all dogs in general.

If the dog had a right to be there, then I admit that this action is maintainable; but for the reasons which I have before given, and some which I shall have occasion to add in observing on one of the plaintiff's arguments, I conceive it to be clear that he had not.

I have put this case altogether upon the rights of the defendant on his own land, without considering under what circumstances a man may acquire a title to game, which he kills, because if he has not a legal right to enter my land in pursuit of the game, as in this case he certainly had not, such considerations do not touch the present question.—I know it is a rule of law that I must occupy my own, so as to do no harm to others; but it is their legal rights only that I am bound not to disturb;—subject to this qualification, I may occupy or use my own as I please. It is the rights of others, and not their security against the consequences of wrongs, that I am bound to regard.

Numberless instances might be stated, not in substance distinguishable from the present, in which men have uniformly acted upon this principle, without objection or question.—I believe it never was doubted, that the owner of a several fishery, with the soil, might place hooks in the bed of the stream, to destroy the nets of persons endeavouring unlawfully to fish in it; or that the occupier of a field may fix bushes thereon as a guard against those who shall attempt, without his leave, to draw nets over it for game.

The immediate object, in both these cases, is not to destroy the nets, but to prevent all persons from invading

their neighbour's property, by the danger of destruction to their own. If they do invade it, the nets will as certainly be destroyed there, as the dog is here; and, in both cases, the consequences must equally rest with the owner.

In point of strict right, there is no distinction between a dog and a net: both are personal property, and secured to the owner by the same rules of law. We naturally lament, in all cases, where an innocent animal suffers; but let it be remembered, that it is the voluntary act of his master, which exposes him to this danger; and in the present case, I may add, after caution given to avoid it.

It should also be observed, that the verdict states these dog-spears to have been planted for the destruction of foxes, as well as dogs, and they are calculated equally for the destruction of both, in their passage through the land.—Now it certainly was one of the defendant's rights to destroy foxes, on his own land, by this, or any other instrument of annoyance; and it does seem most extraordinary to say, that he shall be restrained in his right of destroying foxes by this sort of instrument, lest dogs, which may come wrongfully on his land, should suffer by the same means. If it be true, as the plaintiff must contend, that it was unlawful in me to set up these defences on my land, lest his dogs pursuing game that way should suffer by them, it follows that he must have a right to enter and remove them, for then they are an abateable nuisance: in other words, he may, himself, justify a trespass on my land, to secure a safe passage for his dogs in their subsequent aggressions thereon.—I cannot persuade myself that this is the law.—I come next to the authority of decided cases; the only one which touches the present question is that of *Blithe v. Topham* (a),

1817.  
  
 DEANE  
 v.  
 CLAYTON.

---

(a) *Cro. Jac.* 158. *S. C. 1 Roll. Abr.* 89.



1817.  
 DEANE,  
 v.  
 CLAYTON.

which in my opinion is strong against the plaintiff: but before I observe upon it, I will state shortly, in what cases an action of this nature is confessedly supportable, and upon what ground alone it can stand.

If I divert a water-course from my neighbour's land, or corrupt it in its passage through mine, or erect a new building, which obstructs the lights of his dwelling-house, I am liable, as has been truly said, to an action at his suit; because he had a right to the water-course, and to the lights, and I have disturbed him in the enjoyment of those rights; but let me suppose that the watercourse does not flow out of my land into his, but goes off another way; and that after I have rendered the water unwholesome, his cattle escape into my land, without right, and suffer by drinking the corrupted water there,—there is no pretence for saying that he can maintain an action against me, because he had no right in the water; nor had his cattle any right to come upon my land, where they drank it, and the hurt which they suffered is referable solely to their own wrongful aggression.—So it is here: if the dog had a right to enter the defendant's land, the action would have been maintainable; but as he entered without right, the consequences rest with himself. If I dig a pit, or fix instruments of annoyance upon my land, over which another has a right of common, or a right of way, or any other right, and his cattle, in the exercise of those rights, are thereby destroyed or damnified, he may unquestionably maintain an action against me for the injury which he suffers. But why?—Because, in those cases, his cattle had a right to be where they were, and received damage from my wrongful obstruction to the exercise of that right. Their right to be there is the jet of the action; and in no instance has such an action been supported, where the cattle had no right to be in

the place in which they received the damage, unless the defendant had used some undue means to entice them thither, as in *Townsend v. Watben* (a), which stands upon a distinct ground, (see 1 *Roll. Abr.* 88.), where the cases in which such an action lies are collected together.

Here, the dog had no right to be where he was, and the defendant had a right to obstruct him; and, consequently, there is no pretence for supporting this case from analogy to any of those to which I have alluded.—The case of *Blithe v. Topham*, which I mentioned before, was an action upon the case brought against the defendant for digging pits on a common, whereby plaintiff's mare straying thereon fell into one of them, and died.—There was a verdict for defendant, and the plaintiff, to save his costs, moved in arrest of judgment, that the action could not be supported, because it did not appear that the plaintiff's mare had any right to be on the common, and of that opinion was the whole court; and it was adjudged that the bill should abate.—An authority more directly in point against the plaintiff, in the principle upon which it was decided, can hardly be stated. The defendant was there held not to be answerable for the damage done to the plaintiff's mare, because the mare had no right to be on the land, where the pit, into which she fell, was dug; and, by the same rule, the present defendant is not answerable for the damage done to the plaintiff's dog, because the dog had no right to be where the dog-spear, by which he suffered, was planted.—Since I heard my brother *Dallas's* statement of the case put by Lord *Kenyon*, in *Brock v. Copeland* (b), I have thought that, that was also a strong authority against the plaintiff.—The defendant, in that case, kept a mischievous bull in a close of his own, and the plaintiff crossing this close was gored

1817.  
DEANE  
v.  
CLAYTON.

---

(a) 9 *East*, 277.—(b) 1 *Exp.* 203.

1817.  
 DEANE  
 v.  
 CLAYTON.

by the bull: it was further proved, that the defendant had acquiesced in the use of a way over his close, and that the plaintiff was passing along such permitted way. —Upon this ground, Lord *Kenyon*, and afterwards the court of *King's Bench*, held, that the action was maintainable, because the defendant had held out to the plaintiff, and the rest of the public, that they had a right of passage through his close, and having encouraged them to exercise the right, he must not annoy them in the act of using it. But for this it was admitted, that the action could not be maintained, because, though the defendant's bull was mischievous, the plaintiff would have no right to enter the close in which he was kept; and, consequently, would have had no just cause to complain of the hurt he received there.—If the plaintiff's dog had escaped into the close, and been gored by the bull, the consequence would have been the same. The plaintiff would have had no ground of complaint, because his dog had no right to be where the bull was kept; and so it is here, and the true test, by which to try whether such an action as the present be maintainable or not, is to ask whether the man or animal that suffered had a right to be where he was when he received the hurt. I may add to this, that the absence of all authority and precedent for maintaining such an action, furnishes in itself the strongest argument against it.

Having stated the grounds upon which I think that this action cannot be maintained, either upon principle or authority, I shall proceed to examine the reasoning, by which the plaintiff has endeavoured to support it; confining myself to the arguments used at the bar, upon which alone I think myself at liberty to observe.

*First*, it has been argued, that the plaintiff having started this hare on ground, over which he was at liberty to sport, had a legal right of following it by himself and his dogs,

over the land of the defendant, and would not himself have been a trespasser in so doing.—If this position were law, the present action might certainly be supported, upon the principles which I have before stated, because the plaintiff's dog would then have had a right to be where he was, and the defendant would have had no right to obstruct him. But the law is clearly otherwise; the plaintiff would, in such case, be clearly a trespasser himself: (See *Sutton v. Moody*) (a), and his dog was, at all events, wrongfully upon the defendant's land, whether the master was answerable in trespass for the act of his dog or not.

*Secondly*, It has also been said, that because I could not justify killing or maiming dogs, which were found wandering over my land, without right; therefore I cannot justify the setting up a defence which is likely to produce the same effect. But the two cases are widely different. In the one, I make an immediate and direct attack on the animals, with no object in view but their destruction, which I have no right to effect, if they can be removed from my land, by less violent means: in the other, I merely set up a guard against all wrong-doers, generally. The primary object of this guard was protection to my own property, not mischief to theirs.—The mischief produced was incidental, and arose entirely from their transgressing the bounds within which they ought to have been confined.—To make any thing of this argument, and to found any certain rule upon it, it must be carried to the extent of proving, that we can set up no defence for the protection of our houses or land, which is likely to produce more injury to aggressors than we could legally inflict upon them, if caught in the act of aggression; for otherwise we shall be left without any rule at all. But such a proposition never can be supported.

1817.  
  
 DRAKE  
 v.  
 CLAYTON.

---

(a) 1 Lord Raym. 250. & 1 Roll. Abr. 507.

1817.  
 DEANE  
 v.  
 CLAYTON.

Almost every defence, which we set up, is of this description.—A spiked gate to a field, or broken glass on a garden wall, will inflict wounds on men or animals, who endeavour to break over them, which if the owner of the field or garden found them therein, he would not be justified in inflicting, and he certainly foresees, and must, therefore, intend this consequence evidently: yet it was never doubted, that such defence might lawfully be set up by every man in his own land; because general prevention, and not particular mischief, was his primary object.

*Thirdly*, Another ground taken in support of this action was, that the owner of a dog is not answerable, in trespass, for aggressions committed by it against his will, upon the land of others.—Be it so; but this, as I before observed, furnishes no argument against the landowner's right to set up such guards as he pleases upon his own land, against such aggressors. If I have no remedy against the owners of dogs, that wrongfully break in upon my property, it is surely the more reasonable that I should be permitted to use effectual means for stopping them.

*Fourthly*, the want of a sufficient fence, to keep dogs out of the defendant's wood, has been urged against him; but this, as it regards the present case, is, I think, the fault of the plaintiff, and not of the defendant.—The defendant, and Mr. *Townsend*, have land adjoining to each other, not separated by any sufficient fence: neither of them is bound to erect such a fence, but either of them may do it; and if Mr. *Townsend* choose to sport upon his own land, with a dog too ungovernable to be prevented from wandering into the defendant's, where he has no right to go; it is his business to set up a sufficient fence to prevent this, or he must take the consequence. I put this as the case of Mr. *Townsend* himself, because it is impossible that the plaintiff, who acted only under his

licence, can be in a better situation than he would himself have stood in.

*Fifthly*, It has been likewise urged, in illustration of the doctrine contended for by the plaintiff, that he who plants an instrument of destruction, within the limits of his own ground, to deter trespassers from entering upon it, is criminally answerable for all the consequences that may ensue therefrom; and from hence it has been argued, that he must be civilly answerable for all damage occasioned thereby. I am by no means prepared to adopt this as a position which cannot be controverted; nor do I think, that if established, it would lead necessarily to the conclusion which the plaintiff would draw from it; but at all events, it presents a very different question from the present, and may turn upon very different considerations.—It is enough to say, at present, that this point has never been decided, and that the case now before us does not call for any decision upon it.—These are the arguments which have been produced in favour of the plaintiff's action, and as they have failed in convincing me, that it is supportable, I think, for the reasons which I before stated, that there must be judgment for the defendant.

The judgment was accordingly entered for the defendant, to enable the plaintiff to carry the case farther; but if the plaintiff did not think fit so to do, then no judgment was to be entered.

1817.

DEANE  
v.  
CLAYTON.

Monday,  
May 19th.

HINDMARSH v. CHANDLER.

If a defendant be sued as administratrix during her minority, and appear by attorney, such appearance is irregular, as she should have appeared by guardian.

MR. Serjt. *Best*, on a former day in this term, had obtained a rule *nisi*, to set aside the appearance and subsequent proceedings in this cause, and that the defendant (an infant), should appear by guardian.—The fact was, that the defendant being sued as administratrix, had appeared by attorney, during her minority.

Mr. Serjt. *Pell* now shewed cause on an affidavit of the attorney, who stated that he was not aware of her infancy, until after the appearance, that the letters of administration were consequently revoked, and had since been granted to another. As, therefore, she could no longer be considered as administratrix, no action could be brought against her in that capacity, and it was unnecessary for a guardian to be appointed, as her liability had ceased on the revocation of the administration.

Mr. Serjt. *Best* insisted that he was entitled to his rule, as the defendant was administratrix at the time the present action was commenced.

Lord Chief Justice GIBBS.—The defendant must appear by guardian, and be at liberty to plead *de novo*.

Rule absolute.

## LINGHAM v. LANGHORN.

Monday,  
May 19th.

MR. Serjt. *Best*, on a former day in this term, moved to set aside a rule which had been obtained for costs, for not proceeding to trial pursuant to notice, on the ground that the defendant had moved for judgment, as in case of a nonsuit, without costs, before that rule was granted.—He contended that the defendant having omitted to insert these costs in the former rule, he could not afterwards apply for them.

If a defendant in his rule for judgment as in case of a nonsuit, omit to apply for his costs for not proceeding to trial pursuant to notice, he cannot after that rule, be discharged, obtain a separate rule for such costs.

Mr. Serjt. *Vaughan* now shewed cause, and observed, that the plaintiff had been under peremptory terms, no less than three times to try his cause.—In *Jordaine v. Sharp* (a), it was decided that the plaintiff might have a rule for costs, for not going to trial, and a rule for judgment, as in case of a nonsuit, at the same time.—As the court, on the defendant's motion, as in case of a nonsuit, extended a third indulgence to the plaintiff, on a peremptory undertaking to try, on payment of costs as a condition precedent, under which the defendant had received the costs of that application, he insisted that he should also be entitled to receive his costs for not proceeding to trial. His right to costs therefore would, if this rule were made absolute, be entirely restricted by the court.

Mr. Serjt. *Best*, in support of the rule, insisted that the plaintiff had paid the defendant, on the discharge of the former rule, the costs which he then required, and which were taxed and paid.—The costs were taxed under that rule, merely for judgment, as in case of a nonsuit.—The defendant was only entitled to those costs, on the

---

(a) 2 H. B. 280.



1817.

LINGHAM

v.

LANGHORN.

discharge of his former rule. It is quite clear that after the discharge of that rule, he cannot obtain a separate one for those costs, which ought to have been included therein.

Lord Chief Justice GIBBS.—This is an application by my brother *Vaughan* to obtain costs for not proceeding to trial, pursuant to notice.—That rule being in the first instance absolute, my brother *Best* has applied to discharge it.—The question is, whether the rule has been improperly obtained. In the case of *Clarke v. Simpson* (a), it was determined that a defendant, who moves for costs for not proceeding to trial, cannot have judgment as in case of a nonsuit for the same default. By the practice of the court, the defendant might have applied for judgment, as in case of a nonsuit, or for the costs of not proceeding to trial. If he had obtained judgment, as in case of a nonsuit, and the rule had been made absolute for that purpose, he would have the costs of course. If, on the other hand, the rule had been discharged, on a peremptory undertaking, it is in the discretion of the court to grant them or not; and in this case, had the rule been properly expressed, they certainly would have been allowed.—A party having applied for judgment, as in the case of a nonsuit, cannot, by a subsequent separate rule, apply for costs for not proceeding to trial, and for this obvious reason, that he has made two motions where one only is requisite.—By the oversight of the defendant, he has not obtained the costs to which he was entitled. Had he adverted to the rule, he would certainly have procured them. The practice is not disturbed, because he might have full justice done him, in the first instance, for which he did not apply. He has no right to draw up this side-bar rule without notice; but having obtained

---

(a) 4 Taun. 491.

the plaintiff has moved to set it aside.—Although writs are usually allowed in motions for irregularity, yet, under the peculiar circumstances, I think that the justice of the plaintiff's case would be satisfied by making this

Rule absolute, without costs.

1817.

LINGHAM  
v.  
LANGHORN.

REDFORD v. GARROD.

Monday,  
May 19th.

MR. Serjt. *Vaughan*, on a former day in this term, obtained a rule to shew cause why the writ of *feri facias* issued in this action should not be set aside for irregularity, with costs. He founded his motion on an affidavit which stated that final judgment was signed on the 14th of May, that a writ of error had been sued out and allowed on the 2d of that month, and that such allowance was duly served on the plaintiff's attorney on the last mentioned day.

Mr. Serjt. *Best* now shewed cause on an affidavit, which stated that the defendant, in *November* last, called on the plaintiff, and proposed terms of compromise, by paying a sum of money in full satisfaction of the debt and costs, and told him that if such terms were not accepted, he should have nothing, and that he would bring a writ of error, and keep him out of the money as long as possible. He relied on the cases of *Spooner v. Garland* (a) and *Hawkins v. Snuggs* (b).

Mr. Serjt. *Vaughan*, in support of the rule, insisted that those cases were inapplicable to the present, as the

The court set aside an execution issued pending a writ of error, sued out before final judgment signed, when the defendant had six months previously declared that if the plaintiff did not accept the terms then proposed, he should never have any thing, and that he, the defendant, would ultimately bring a writ of error.

(a) 2 M. & S. 474.—(b) *Ibid.* 476.

1817.  
 ~~~~~  
 REDFORD  
 v.  
 GARROD.

defendant there had used direct terms of delay. The affidavit here did not state that this was expressly intended for such delay. Unless, therefore, the affidavit had distinctly expressed that the writ of error was brought for the purpose of delay, it was not sufficient; and the writ of *feri facias* could not therefore be set aside.

Lord Chief Justice GIBBS.—If there be an express declaration that a writ of error be brought for the purpose of delay, or a declaration, which cannot refer to any other meaning, the courts have refused to permit parties to proceed further. In all cases, the declaration of such delay has been considered as a necessary imputation, and in those cited, has invariably been made after judgment signed. In *Masterman v. Grant* (a), it appeared in the affidavit, that the defendant's attorney had said, that the reason why he had brought the writ of error was, that if the defendant should pay the money pending the action, he should never get it again from the defendant in the original action; but that while the cause was depending, he might prevail on him to settle it;—and the court there held, that those expressions of the attorney were equivalent to a declaration, that the writ of error was brought for delay. In *Spooner v. Garland* (b), the defendant's attorney, after judgment for the plaintiff, proposed that the defendants should give a *cognovit*, and afterwards made a second application, and observed, at the same time, that if it was not accepted by the plaintiff's attorney, he should be under the necessity of bringing a writ of error to obtain the time he had requested under the *cognovit* proposed, for that he must obtain time.—In *Rawlins v. Parry* (c), the court said that the ad-

---

(a) 5 T. R. 714.—(b) 2 M. & S. 474.—(c) 1 N. R. 307.

mission on the part of the defendant was not expressed, and that it was not necessary to be implied from the language of the attorney that he brought the writ of error merely for delay. In all the cases cited, the parties have distinctly sworn that the writ of error was brought for the purpose of delay, and are more direct in proof than the affidavit in the present case. This affidavit merely contains a declaration made at an early stage of the proceedings; the defendant called at the house of the plaintiff, and said, that if he did not accept the terms he then proposed, he should have nothing, and that he would eventually bring a writ of error; as, therefore, this declaration was made in an earlier stage of the proceedings, and is not so direct and positive as in the other cases, the rule to set aside this execution must be made

1817.  
  
 REDFORD  
 v.  
 GARROD.

Absolute.

## REGULA GENERALIS.

*It is Ordered,* That from thenceforth in every rule, and also in every judge's order for the allowance of bail which contains also an order for a *supersedeas* to discharge the defendant out of custody, there be inserted in the body of such rule, or order, in words at length, the sum for which such bail was allowed, and that the same sum be also written in figures in the margin thereof, and that there be inserted in the body of every such *supersedeas* in words at length the sum for which such bail was allowed, and that the prothonotary, or his clerk, who signs the *supersedeas*, shall endorse the same sum in figures in the said writ, which endorsement shall be settled by the initials of such prothonotary or clerk. That the said sum so directed to be inserted in the body of such rule or order in the body of the said writ, and the said sum also directed to be written in figures in the margin of the rule or order, and to be endorsed on the writ of *supersedeas*, shall in no case be written on an erasure, and every such rule and order shall be retained, and filed in the prothonotaries office.

*N. B.*—This rule was made on account of the fraud attempted to be practised in the case of *Lock v. Crockett*, ante, p. 144.

END OF EASTER TERM.

**C A S E S**

**ARGUED AND DETERMINED**

**IN THE**

**Courts of Common Pleas**

**AND**

**Exchequer Chamber.**

**IN**

***TRINITY TERM,***

**IN THE**

**FIFTY-SEVENTH YEAR OF THE REIGN OF GEORGE III.**

April 30th.

**PRESSLE and others v. BOGHURST and others (a).**

If, in a bond made in contemplation of marriage, the obligor agree to settle all lands and hereditaments of which he should be seised during his life upon his intended wife, and the issue of the marriage in such parts and proportions, and to such use and uses as should be thought requisite, the better to make a provision for his intended wife, in case she should survive him :—*Held*, that such obligor having survived his wife, by whom he had issue, and married another by whom he also had issue, would not commit a breach of the condition, if he did not make a settlement of property acquired during the second marriage upon the issue of the first.

A CASE, of which the following is the substance, was sent by order of the Lord Chancellor for the opinion of the judges of this court.—By a bond, dated the 10th day of August, 1768, *John Pressle*, the younger, deceased, became bound to *Hans Sloane* and *John Tilden*, in the penal sum of £2,000, which bond recited, that a marriage was intended shortly to be had and solemnized between the obligor, and *Mary Townsend*, spinster, and that the obligor was to receive, on the day of marriage, the sum of £200, and that the said *Mary Townsend*, being likewise possessed of, or entitled unto a very considerable share or moiety of the personal estate, which was of *Thomas Townsend*, her late father, which, immediately after the decease of her mother, *Mary Townsend* the elder, would come to her the said *Mary Townsend*, the daughter; and that in consideration thereof, and of the love and affection which the obligor bore towards her, the said *Mary Townsend* his intended wife, and for making a provision for her and the issue of the intended marriage, in case the marriage should take effect, the obligor had agreed, not only to pay such sums of money as were thereafter mentioned to such persons, and at such times as were thereafter expressed; but had also agreed, that if at any time, during the term of his natural life, he should be seised of any messuages, tenements, lands, and hereditaments in possession, that he would, by such good conveyances in the law, as counsel should advise, settle the same upon the said *Mary Townsend*, and the issue of the intended

---

(a) This and the following case were argued in the course of the last term; but the certificates were not furnished until the vacation.

marriage, in such parts and proportions, and to such use and uses as should be thought requisite, the better to make a provision for the said *Mary Townsend*, in case she should happen to survive the obligor. And the condition of the bond was, 'That if the intended marriage should take effect, and *Mary Townsend* should happen to survive the obligor, then, if the heirs, executors, administrators, or assigns of the obligor, should, within three months next after his decease, pay to the obligees, their executors, administrators, or assigns, the sum of £1000, in trust, and for the only use and benefit of the said *Mary Townsend*, her executors, administrators or assigns, to be by her and them peaceably and quietly held and enjoyed, and to be disposed of to her and their own proper use and uses for ever: And also, that if the said marriage should take effect, and the obligor should survive the said *Mary Townsend*, and that if there should be any child or children of her begotten by the obligor, living at the time of his decease; then, if the heirs, executors, administrators or assigns of the obligor, paid to the obligees, their executors, administrators or assigns, the sum of £1000, in trust, nevertheless, and to the intent that the obligees, their executors, administrators, and assigns, should pay and dispose of the said sum of £1000, unto and amongst all and every the son and sons, daughter and daughters, of the said *Mary Townsend* by the obligor to be begotten, in equal shares and proportions, if there should be more than one, and if but one, then wholly to that one, at their respective age or ages of twenty-one years; and that in the mean time, the obligees, their executors, and administrators, should pay and apply the interest and proceeds, accruing and arising from the said sum of £1000, to and for the sole use and benefit of such son and sons, daughter and daughters, equally, if more than one, and

1817.  
 PRINCE  
 v.  
 BOGHURST.



1817.  
  
 PREBBLE  
 v.  
 BOGHEWIST.

if but one, then wholly to the use and behalf of that one: and, further, that if the said marriage should take effect, and the obligor should at any time, during his natural life, become seised of any messuages, tenements, lands, and hereditaments, in possession, and should convey, settle, and assure the same, upon the said *Mary Townsend*, and the issue of the marriage, by such good conveyances in the law, as counsel should advise, in such parts and proportions, and to such use and uses, as should be thought requisite, the better to make a provision for her the said *Mary Townsend*, in case she should happen to survive the obligor, then the said bond was to be void.---The marriage was solemnized, and the plaintiffs were the issue, who are all now living, and have long since attained their respective ages of twenty-one years; *Mary*, the wife of the obligor (formerly *Mary Townsend*), died in the year 1775, and the obligor did not become seised of any messuages, tenements, lands and hereditaments, in possession, during the continuance of his marriage with the said *Mary Townsend*.—After her death, the obligor, in the year 1782, married the defendant, *Ann Prebble*, and had issue several children of his second marriage, who are now living, and after the second marriage, and not before, the obligor became seised of an estate, called *Black Acre*, in possession.—The question, therefore, for the opinion of this court was, Whether, according to the true intent of the condition of the bond, the obligor would commit a breach of such condition, if he did not make a settlement of the estate, called *Black Acre*, upon the issue of the first marriage?

Mr. Serjt. *Best*, (and Mr. Serjt. *Pell* was with him) for the plaintiffs, submitted that the obligor would have been guilty of a breach of the condition of the bond, if he had not settled the property he became seised of, on the issue of his first marriage. Although there might be

considerable obscurity in the condition, still there could be no doubt as to the intent. It is clear, from the situation of the parties, as well as from the nature and terms of the instrument to make a provision, not only for the wife, but also for the children of the first marriage. The bond must be taken most strongly against the obligor, who, if he became seised of any estate during his life, was bound to settle it on his first wife, and the issue of that marriage. The prior words, whereby the obligor had agreed, that if at any time, during his natural life, he should be seised of any lands in possession, he would settle the same upon the said *Mary Townsend* and the issue of the marriage, in such parts and for such uses as should be thought requisite, are absolute; and, therefore, whether he became seised of *Black Acre*, either before or after the second marriage, the obligor was bound to settle it on the issue of the first. The subsequent words are, in order to make a provision for *Mary Townsend*, in case she should survive the obligor, which do not control the former. It is evident, that these latter words can have no such effect; as they do not make it a condition precedent, that the wife should outlive the husband before any property should be purchased; but they merely regulate the limitations of property to take effect in that event; neither can such words override the whole of the instrument, but merely tend to shew, that if the wife survived the obligor he intended to make a provision for her during life, and for her children after her death. The property is further settled in parts and proportions upon *Mary Townsend*, and the issue of the marriage, and to such use and uses as should be thought requisite. If it had been the intention of the obligor to settle all this property on the wife, there would have been no need for its division into parts and proportions, and if one use had been declared for her, it would have

1817.  
 {  
 PARSONS  
 v.  
 BOGHEAST;

1817.

FREBBLE

v.

BOGHURST.

sufficed. This construction makes the whole of the instrument intelligible, and there are also other parts of the bond, which shew the intent of the obligor to provide for the children, as well as the wife. It was further the intention of the obligor to make provision for his children; as, if his wife should survive him £1000 should be at her disposal, as he thought she should have the power of dividing it among the children as she chose; but if she died during the continuance of his life, then it was to be conveyed to trustees, to be paid to the children in equal proportions, at the times they should respectively attain the age of twenty-one years.

Mr. Serjt. *Blisset*, *contra*, insisted that the defendants, who were the issue of the second marriage of the obligor, were entitled to the estate in question, either with respect to the situation of the parties, the nature of the instrument, or the terms in which it was expressed. The bond was given in consideration of an intended marriage. It is therefore wholly improbable that the husband should consent to settle, not only the property he was then possessed of, and all he should be entitled to during marriage, but all such as might descend to him after his marriage with a second wife, and all that he might become seized of after the decease of his first. It is also inconsistent that the husband should intend to fetter his future property. The condition of the bond must be construed most beneficially for the obligor, and not to his prejudice, as in the case of a grantor. The terms of the instrument are conformable to the intention of the parties. The penalty of the bond is £2000, which is double the sum intended to be settled on the wife, if she survived, and on her issue if her husband survived. It was therefore clearly meant to provide for the issue of the marriage. From what source of property was that issue to be provided for? Could it be from all the property to which the husband

might become entitled, during his life, to the prejudice of his future issue, or only to that property which might descend to him during his second marriage? This property was to be settled in the event of the marriage, and it appears, in the recital of the bond, that the obligor would receive £200, as the immediate property of the wife, and it was then further recited, that she would become entitled to a considerable share or moiety of the personal estate of her late father, after the death of her mother. How could the latter property benefit the husband, unless it had fallen into his possession during the coverture? Had the mother outlived her she would not have been entitled to it. [Lord Chief Justice *Gibbs*.—This was a vested interest in the wife.]—Although this was a vested interest in her, still the husband could not dispose of it, unless he became possessed during the coverture. It is in favor of the defendants, that the sum of £1000, is not omitted by mistake, but that it is expressly provided for. It is therefore quite clear, that the contingencies of the husband's surviving the wife, and the wife's surviving the husband, are not omitted by mistake, but distinctly provided for in the limitations. These contingencies are also respectively mentioned, with regard to the future acquired estates, by the words 'the better to make a provision for the said *Mary Townsend*, in case she should survive the obligor.' If she had survived her husband, it cannot be contended that the settlement of his future property should be confined to her alone, and not extended to her issue. The words, 'parts and proportions,' are equally consistent with this construction, as, if she had survived her husband, the property would have been settled on her and her issue. So, the words, 'during his natural life,' shew that no lands were to be settled for these purposes; but such only as he should become en-

1817.

PERRIN

2.

BOONBAST.

1817.

PASSELL

v.

BOGHEAT.

titled to, during the joint lives of himself and of his wife. He might have settled any property, which might have descended to him during the life of his first wife, although she survived him, but he clearly intended to settle such property, only during the joint lives of both. This being a bond, conditioned for the performance of a certain thing, it cannot, by any legal authority, be construed to extend to a condition, *cy pres*.

Mr. Serjt. *Best*, in reply, observed, that although it had been stated that it was improbable the husband should settle all his property on his first wife and her issue, and that he did not contemplate a future marriage, still such settlement applies only to his real, but not to his personal estate. After the marriage, therefore, he might prevent all property from being settled, with the exception of such as might be given, or come to him by descent during his life. Which is the most probable? That he should leave his issue wholly unprovided for, or that, on receiving £200, as the immediate portion of his wife, and a vested interest in other reversionary property, he should mean in the event of his wife's death, to make no provision for his children.—The bond is conditioned to settle all his real property on his wife and her issue. It was therefore clearly his intention to make a provision for such issue out of his real property; and as he has not done so, the condition in the bond is forfeited. No authority has been cited to shew that the condition, being in favor of the obligor, must be construed most favourably for him.—[Lord Chief Justice *Gibbs*.—That construction can only be applicable to the case of a grantor.] This is in the nature of a covenant, and must therefore be enforced most strictly against the covenantor. It has been argued, on the part of the defendants, that the obligor only intended, after the death

of his wife, to make a provision, in money, for his children; but that is impossible, as £1000 were mentioned in the condition of the bond, because the obligor, at that time, was possessed of no real property. The intention of the obligor was this: that if the wife should survive him, this sum should enure for her benefit; but in case he survived, then, that such sum should be applied for the benefit of his issue, if the circumstances of the obligor should continue in the same state; but if he purchased lands, they must be also added for the benefit of the wife and children, for the one could not be substituted for the other. It has been also insisted, that the fortune of the wife was small, but such fortune is, of itself, no consideration. The immediate portion might be small, but the reversionary property expectant on the death of her mother, would not only vest in the husband and be in his immediate disposal, when that event should happen, but he had also a power of disposing of his reversionary interest.—Marriage, alone, is a sufficient consideration for any settlement. *Mary Townsend* is not the entire object, for had she outlived the obligor, then the settlement must have been made on her and her issue. The words, 'parts and proportions,' evidently shew, that a part should be settled on the wife, and a part on the children. If it had been conceded to me, that in the event of the wife's surviving her husband, all the estate was not to be settled on her for life, with remainder to the issue, but a division was to be made, and a part only was to be settled on the wife, and other parts on the children, the obvious meaning of the instrument is to make a provision for the wife for life, as well as for the issue after her death. The property being divided into parts, in the first instance on the wife, and the second on the children, the evident intention of the obligor is

1817.  
  
 PRINCE  
 v.  
 BOENHART.

1817.  
 PREBLE  
 v.  
 ROCHURST.

a settlement on all. A provision for the wife, for maintenance during her life, but in the event of her death, a settlement for her children. It is therefore clear, from the construction of the whole of this instrument, that it was the intention of the obligor to make a provision, not only for the wife, but also for the issue of the first marriage. As the wife did not survive, the full effect is given to those other words, to make provision for the issue. The only question therefore is, whether the obligor, by making no settlement, has violated the condition of his bond.

The following certificate was afterwards sent to the Lord Chancellor.

We have heard this case argued; we have considered it, and are of opinion that, according to the true intent and meaning of the condition of the said bond, the said *John Preble*, having survived the said *Mary Preble*, (formerly *Mary Townsend*) would not commit a breach of such condition, if he did not make a settlement of the estate, called *Black Acre*, upon the said issue of the said first marriage.

V. GIBBS.

R. DALLAS.

J. A. PARK.

J. BURROUGH.

The ATTORNEY-GENERAL, at the relation of CLARK,  
and another, informants, v. The MAYOR, JURATS, and  
COMMONALTY of the ancient town of RYE, and others.

May 12th.

A CASE, of which the following is the substance, was sent by the direction of the *Master of the Rolls*, for the opinion of the judges of this court.

Before, and since the year 1708, the town of *Rye*, in the county of *Sussex*, hath been incorporated by the name of *The Mayor, Jurats, and Commonalty of the ancient Town of Rye*.—*James Saunders*, by his will, dated the 7th of *January*, 1708, devised certain lands and premises in the county of *Kent* to the right worshipful the mayor, jurats, and town-council of the ancient town of *Rye*, for the time being, and their successors for ever, upon the several trusts, uses, and considerations, and by and under such restrictions, as in that will was afterwards directed, limited and appointed, and to and for no other use, intent, and employment whatsoever, (that is to say:— Upon trust and confidence that the said mayor, jurats, and town-council, for the time being, or the major part of them, should and would provide a good convenient school in the said ancient town of *Rye*, and should also provide a good, sober, and discreet school-master, who should teach and instruct the poor children of the ancient town aforesaid, to read in *English*, and write, to cast accounts, and to teach and instruct them in the art of navigation (*gratis*), so as they did not exceed the number of seventy at any one time; and that the said children should be sent by the nomination of the said mayor, jurats, and town-council, of the said ancient town of *Rye*, for the time being, and upon this further trust and

A devise of lands for the establishment of a school to "The right worshipful the mayor, jurats, and town council of *Rye*," was held sufficient to pass such lands to "The mayor, jurats, and commonalty of *Rye*," as it appeared to be the testator's intention to devise to that corporation.



1817.  
ATTORNEY-  
GENERAL  
v.  
Corporation  
of RYE.

confidence, that the said school should be continued in the said town of *Rye* for ever thereafter. The testator directed that the yearly rents and profits of the said messuages, lands, and hereditaments, should be from time to time for ever thereafter received by the said mayor, jurats, and town-council, for the time being, and should be by them paid quarterly to the said school-master, for the time being, for his service and care therein, so as the rent of the said school should be thereout first deducted and paid: And it was the testator's will that the said mayor, jurats, and town-council, for the time being, should, (after the founding the said school) be the governors thereof, and that they, or the majority of them, should always have the nomination and appointment of such school-master, and should have full power to remove and displace such master, upon neglect or insufficiency; but should, within three months next after the death or removal of any school-master, nominate and appoint another sober and discreet person that should be fit for such an employ:—And the testator empowered the said mayor, jurats, and town-council, of the ancient town of *Rye* for the time being, or the major part of them at any time thereafter at their discretion, to make and ordain any bye-orders or rules for the better managing the said school, and for the more pious education of the said youths, so as such orders and rules should not contradict his intent:—And it was the testator's further will, that the said mayor, jurats, and town-council, for the time being, should yearly, and every year for ever thereafter, be accountable for the trust in them reposed to the right worshipful the mayor, jurats, and town-council of the town and port of *Hastings* for the time being; and that upon stating such accounts, if the governors of the said charity-school of the ancient town of *Rye* aforesaid, should be found to abuse or misapply the said charity

and trust, the said mayor, jurats, and town-council of the ancient town of *Rye*, should, from themselves, forfeit the said estate and premises so settled upon them for the uses aforesaid for ever unto the mayor, jurats, and town-council of the town and port of *Hastings* for the time being, upon due proof of such misapplication thereof: and the testator declared, that if at anytime thereafter it should happen that the said towns of *Hastings* or *Rye*, or either of them, should cease to be towns corporate; then the testator thereby nominated and appointed, in the room and stead of the mayor, jurats, and town-council, of both or either of the said towns as should so cease to be a corporation, the worshipful the justices of the peace, for the time being, of the county of *Sussex*, residing within *Hastings Rape*, to be from thenceforth the governors of the several charities to the said towns by him given: And the testator thereby gave to the said justices of the peace for the time being the same power and authority, and the same trust and confidence, as was therein before mentioned.—There is no corporation by the name of the mayor, jurats, and town-council of the ancient town of *Rye*, nor is there any town-council therein.—The question for the opinion of this court was, whether any and what estate or interest passed under the above devise to the mayor, jurats, and commonalty of the said town of *Rye*, or to any and what person or persons, or body or bodies corporate.

Mr. Serjt. *Blesset*, on behalf of the corporation, contended, that as there was but one incorporation in *Rye*, and that as it was the evident intention of the testator to devise the lands in question to that incorporation for the purposes expressed in his will, such devise could not be avoided. The description, therefore, of town-council introduced in the will, instead of commonalty, cannot affect the question.—This general doctrine is fully laid down in the case of the *Chancellor of the University of*

1817.

ATTORNEY-  
GENERAL  
v.  
Corporation  
of *Rye*.

1817.  
 ~~~~~  
 ATTORNEY-  
 GENERAL  
 v.  
 Corporation  
 of Rye.

*Oxford* (a), where it was resolved, that in an act of parliament, *misnomer* of a corporation, when the express intention appears, shall not avoid the act, more than in a will; for *parliamentum testamentum et arbitramentum*, are to be taken according to the minds and intentions of those who are parties to them: and, therefore, when the description of a corporation, in an act of parliament, or in a will, is such, that the true corporation intended is apparent, and it is impossible to be intended of any other corporation, although the right name of the corporation, (which is requisite to be expressed in grants and deeds) is not precisely followed; yet the act of parliament and will shall take effect.—So, in an *anonymous* case (b), a devise was made to the mayor, chamberlain, and governors of the hospital of *Saint Bartholomew*, in *London*, wherein they were incorporated by the name of the mayor, citizens, and commonalty; yet the devise was held good, as it must be taken according to the intent of the devisor.—Even if the corporation had been so described in a grant or lease, such description would have been sufficient. In the case of the mayor of *Lynn Regis* (c), which was a deed to the corporation, *per nomen majoris et burgentium Lynn Regis*, it was objected on the part of the defendant, that the deed varied from the name of the corporation, because they were incorporated by the name of *majoris et burgentium burgi domini regis de Lynn Regis*; such deed, however, was held good, and the court (d) conceived it would be reasonable to drive him who would avoid a writing, demise, grant, &c. made by a corporation, or to it, by reason of any verbal or literal *misnomer*, to shew that there are two corporations in the same city, borough, or town, &c.; one by the true name, and another by such

---

(a) 10 Coke, 57. b. — (b) *Dalison*, 78. S. C. *Owen*, 35. 3 Leon. 18, 19. — (c) 10 Coke, 122, b. — (d) See Lord Coke's judgment, 10 Coke, 120, a.

name as is contained in the deed, &c. and so leave the deed, &c. good, by or to one of them. But when in truth, there is but one and the same corporation, leases, grants, &c. made by them or to them, ought not to be avoided by such nice and verbal variances; when, in substance, the true name of the corporation, either by matter expressed, or necessarily implied in the words themselves, appears to the court. So, in *Dr. Ayrey's case* (a), the true name of a corporation was *præpositus et scholares aula scholarium Regine de Oxon*, who presented by a deed under their common seal, *per nomina præpositi collegii Regine, in universitate Oxonia, et sociorum et scholarium ejusdem collegii*, and confirmed the demise of the presentee, *per nomina præpositi sociorum et scholarium aula vel collegii Regine in universitate Oxonia*, and although it was objected that the presentation and confirmation were void, on account of the misprision of the true name of the corporation; yet it was resolved that they were both good, notwithstanding the omission of the iteration of the word *scholarium*. So, King is a name of incorporation, yet a grant made to the King, by the name of 'Sovereign Lord James,' omitting the word King, is good, for *nihil facit error nominis cum de corpore constat* (b), for *nomen est quasi rei notamen et nomina sunt nota rerum*, and were invented to make a distinction between person and person (c). So if *Joh<sup>n</sup>*, abbot of *D.* make a bond by the name of *J. C. Clericus de D.*, such bond was held good (d). So the abbot of *York* was incorporated by the name of *Abbas monasterii beate Mariæ Eborum*, and a bond was made to him by this name, *Abbati monasterii beate Mariæ extra muros civitatis Eborum*, and although the abbey was *extra muros civitatis Eborum*, yet because it was within *York*, the bond was good (e). But in this case there it

1817.

ATTORNEY-  
GENERAL  
v.  
Corporation  
of RYE.

(a) 11 Coke, 18, b. — (b) *Ibid.* 21, a. — (c) *Ibid.* 20, b. —  
(d) *Ibid.* 21, b. — (e) 10 Coke, 126, b.



shew that the testator intended to give these lands to the corporation at large. If the corporation were extinguished, the mayor and jurats would be equally so, and in either of these cases the lands were devised over to the justices of the peace. The testator meant to leave the lands to the mayor, jurats, and town-council, as a select body, and not to the whole corporation. If therefore, on the whole construction of the will, it appear that it was the testator's intention to leave the land to a select body, the corporation at large cannot clearly be entitled to any estate or interest under the devise, and it must therefore descend to the heir at law.

Mr. Serjt. *Bleset*, in reply, was stopped by the court.

Lord Chief Justice GIBBS.—This case has been brought to one point; namely, the intent of the testator.—The cases which have been cited by my brother *Bleset* tend to shew, that if it appeared to be the testator's meaning to devise this estate to the corporation of *Rye*, they should take, although they were incorrectly described. I agree with my brother *Copley*, that if the intent appear to be a devise to the mayor of *Rye* and the select body of the corporation, the whole corporation could not take; but it does not seem to be the intent of the testator to devise the property to any other body than the corporation. There can be no presumption for such an intention.—There is a corporation at *Rye*, known by the name of the mayor, jurats, and commonalty; but there is no body of which a part is known by the name of town-council. The devise is to the mayor, jurats, and town-council. The intention of the testator appears to be, to devise these lands to a body of persons, who could hold in *perpetuo*; and further, that this body should be incorporated.—There is but one incorporation at *Rye*; it is too much to say that this was a devise to the town-council, as a separate body: it is merely a misapprehension of

1817

ATTORNEY-  
GENERAL  
v.  
Corporation  
of RYE.

1817.  
 ATTORNEY  
 GENERAL  
 v.  
 Corporation  
 of Rye.

the description of the corporation of Rye, by the testator, to which he intended that this estate or interest should pass.

The following certificate was afterwards sent to the Master of the Rolls.

'We have heard this case argued;—we have considered it; and are of opinion, that under the said devise, an estate in fee passed to the mayor, jurats, and commonalty of the said ancient town of Rye, and their successors.

V. GIBBS.

R. DALLAS.

J. A. PARK.

J. BURROUGH.

Saturday,  
 June 7th.

Doe, on the demise of ISABELLA DELL v. HANNAH  
 FIGOTT.

If a testatrix devise all her freehold and copyhold estates, situate in or near *Latchingdon* near *Malden*.—*Held*, that such devise is not sufficient to pass a field, situate between four and six miles from *Latchingdon*, and within the town of *Malden*.

THIS was an action of ejectment, brought to recover the possession of two acres of land, called *Tainter-field*, situate in the parish of *Saint Peter*, in the town of *Malden* in *Essex*, and was tried before Mr. Serjt. *Bosanquet* (a), at the last assizes at *Chelmsford*, when a verdict was taken for the lessor of the plaintiff, with leave for the defendant to move to set it aside.—The lessor of the plaintiff claimed to be entitled to this field, as having passed to her under one of the following clauses contained in the will of *Mrs. Jane Lyon*, dated the 1st of *May*, 1779.—‘I give and devise all my freehold and copyhold estates, situate, lying, and being, in or near *Latchingdon*, near *Malden*,

(a) See ante, p. 109.

' in the county of *Essex*, and also, all and singular my  
 ' freehold and copyhold estates, at or near *Palepit*, in the  
 ' said county of *Essex*, which last-mentioned estates are  
 ' now or lately were in the occupation of *Lawrence Parsley*  
 ' and ——— *Thomas*, widow, with their respective rights  
 ' members and appurtenances, to *Charles Mackay* and *Ro-*  
 ' bert *Makpiece* and their heirs, to the uses and upon the  
 ' trusts following:—As to all my said estates in or near  
 ' *Latchingdon*, with the appurtenances, to the use of my  
 ' sister *Margaret*, wife of *Alexander Mackay*, and her  
 ' assigns for life; and as to all and singular other my  
 ' said freehold and copyhold estates at or near *Palepit*,  
 ' aforesaid; now, or late in the occupation of *Lawrence*  
 ' *Parsley* and ——— *Thomas*, widow, with the appurte-  
 ' nances, to the use of my sister *Isabella*, the wife of *John*  
 ' *Purnell*, and her assigns for her life.'

1817.  
 ~~~~~  
 Doe d. DELL  
 v.  
 PIGOTT.

The residuary, or second clause, was as follows:—' I  
 ' give, devise, and bequeath, unto my sister, *Margaret*,  
 ' the wife of *Alexander Mackay*, her heirs, executors, ad-  
 ' ministrators and assigns, one moiety, or half-part of the  
 ' residue of my estates, both real and personal; and the  
 ' other moiety or half-part, I give to trustees for the sep-  
 ' arate use of my said sister, *Isabella*.'

The defendant claimed under a conveyance regularly  
 deduced from *John Solley Purnell*, who derived his title  
 under the following clause in the will of the testatrix,  
 and who had conveyed the field in question, as her heir  
 at law:—' As to all my said estates before-mentioned,  
 as well those at or near *Latchingdon*, as those at or near  
*Palepit* aforesaid, with their respective appurtenances  
 from and after the said estates hereinbefore limited,  
 to the use of my nephew, *John Solley Purnell*, and his  
 assigns for life, and after his decease, to the use and  
 uses of all and every the child and children of the said  
*John Solley Purnell*, and of the several and respective



1817.  
 Doe & Dale  
 v.  
 Pigott.

' heirs of the body and bodies of all and every such child  
 "and children, (such children, if more than one,) to take  
 "as tenants in common and not as joint tenants."

The lessor of the plaintiff was the only child of the  
 nephew of the testatrix, *John Selby Farnell*, (who was the  
 only child of her sister *Isabella*); and as such claimed to be  
 entitled to all the property, of which the testatrix died  
 seized:—It was proved at the trial, on behalf of the  
 lessor of the plaintiff, that *Tainter-field* was four miles from  
*Leadbington*, and that the estate of the testatrix there,  
 was copyhold; whereas the field in question was free-  
 hold, and not in the centre, but beyond the buildings of  
*Malden* in the road to *Leadbington*. On behalf of the  
 defendant it was proved that *Tainter-field* was situate in  
 the parish of *St. Peter*, in *Malden*, and that part of it ad-  
 joined the back part of houses, in the *High-street*, which  
 were nearly in the centre of the town, and that the other  
 part actually abutted on that street; and that the said  
 field was distant six miles and a half from the estate at  
*Leadbington*.

Mr. Serjt. *Owen*, at the commencement of the last  
 term, obtained a rule nisi, that the verdict found for the  
 lessor of the plaintiff should be set aside, and a verdict  
 entered.

Mr. Serjt. *Dow* and Mr. Serjt. *Dow*, on a subsequent  
 day in the same term, showed cause and observed, that  
 the only question was, whether under the former clause  
 of Mrs. *Lyon's* will, *Tainter-field* was intended to pass to  
 her sister *Margaret*, for life, and after her death to her  
 nephew, *Selby Farnell* for life, with reversion to his  
 issue, or whether she meant to die intestate as to this  
 field; or devise it by the residuary clause to her two  
 sisters, and not to her nephew and his issue. The ob-  
 jection is, that *Tainter-field* is not correctly described,  
 as being in or near *Leadbington*, near *Malden*, as it is

situate in *Malden*. The obvious description should have been, in or near *Malden*. It was proved at the trial, that the outskirts of the modern town of *Malden* reached this field, which could not therefore be in *Malden*, but the devise states that all the freehold and copyhold estates of the testatrix were situate in or near *Letchingham*, near *Malden*. The jury only could decide whether this field was in or near *Malden*. The only point now to be considered, is the intention of the testatrix in the construction of the will. Her principal estate, which was copyhold, was in *Letchingham*;—she was not aware of the distance between the two parishes. Had she been so, she would have described her property with greater accuracy. It was the meaning of the testatrix to devise all her freehold and copyhold estates in or near *Letchingham*, near *Malden*, to her two sisters for life, and the ultimate reversion to her nephews and his issue. Her estate at *Essex* might be near *Letchingham*, but she has there superadded the names of the tenants in whose occupation they were, and is not this field situate near *Malden*? As the principal estate of the testatrix was in *Letchingham*, and as she was not acquainted with the distance between the two parishes of *Letchingham* and *Malden*, the description need not be so precise; but is sufficiently accurate in the first clause of her will. As no ambiguity therefore appears on the construction of this clause, the plaintiff is entitled to recover under it, although the residuary clause may not be so clear.

Mr. Serje. Onslow and Mr. Serje. Coke, in support of the rule.—Under the first clause of the will the two sisters of the testatrix had merely a life estate, under a *trust* for trust;—the father of the plaintiff sought to recover this field, as being situate in or near *Letchingham*, near *Malden*. It has been proved that this field is situate in *Malden*, and that it was distant at least four, if not six,

1817.

Doe d. Dalt.

v.

Pigott.

1817.  
 Doe d. DELL  
 v.  
 PIGOTT.

miles from *Latchingdon*. The intent of the testatrix as to the disposition of her property can only be ascertained by its description. In the former clause, she introduced the town of *Maldon*, which was well known to her, as she had a field there, to shew the contiguity of *Latchingdon*, where she considered all her property, devised by that clause, to be situate. It is evident, from the words situate at or near *Latchingdon*, that the testatrix meant to describe *Latchingdon*, near *Maldon*, as being near *Maldon*, without having reference to her field within the latter town. This field clearly vests in the defendant, as being conveyed to her by the heir at law of the testatrix, and her two sisters, or by the residuary clause in the will, as the testatrix evidently intended to die intestate as to this field.—No cases have been cited in support of the plaintiff's claim; but it has been contended that the testatrix meant to dispose of all her property, by the former clause of her will, or, that at all events, she meant to give an ultimate reversion in fee by the residuary clause. Unless this field pass to the plaintiff, as being clearly described in the devise, it is evident that the testatrix did not intend to dispose of all her property to her two sisters; and the defendant, from the omission of such disposition, is entitled to the close in question.

Lord Chief Justice GIBBS.—This was an action of ejectment, brought for the recovery of two acres of land, called *Tainter-field*.—The question is, whether this close passed under the first clause of the will of Mrs. *Lyon*, or whether it remained undisposed of, subject only to the residuary clause. To enable the lessor of the plaintiff to claim it as her property, she must derive her title from the first clause of the will. It appeared in evidence that this close was situate, at least four, if not six miles from *Latchingdon*, and that it was not near, but in the town of *Maldon*. As the plaintiff has not pointed out that this

close was specifically devised to her, in the first clause of the will, it was necessary for her to shew, that it was intended to be included in the residuary clause. Although a doubt has been entertained, as to the construction of these clauses, still it was incumbent on the lessor of the plaintiff to have shewn, with a precise certainty, that this property was described in, and intended to pass by this bequest; but she has failed in so doing. By the evidence, it appeared that the lessor of the plaintiff was not entitled; and therefore the verdict must be set aside, and a nonsuit entered.

Mr. Justice DALLAS.—In the first clause, the testatrix devised her estate, situate in or near *Latchingdon*, near *Malden*. It has been proved that this close was at least four, if not six miles distant from the former, and within the latter town.

Mr. Justice PARK.—This field cannot be in or near *Latchingdon*, because it is four miles distant from it, neither can it be near *Malden*, for it has been proved to be within that town.

Mr. Justice BURROUGH concurred.

Rule absolute.

GALL v. COMMER.

Monday,  
June 9th.

This was an action of *assumpsit*.—The first count of the declaration stated that the defendant was indebted to the plaintiff, in the sum of £350, in respect of divers large quantities of silk, goods, and merchandize, by the plaintiff before that time delivered to the defendant, as

disposed of, and it appeared in evidence that the defendant received a *del credere* commission on guaranteeing the solvency of the purchasers.—Held, that such declaration was insufficient, as the commission was not therein stated.

If a declaration state the defendant to be indebted to the plaintiff, in respect of goods delivered by him to the defendant, to be sold and

1817.

GALL

COMER.

the agent of the plaintiff, and at the request of the defendant, to be sold and disposed of, and which were accordingly sold and disposed of by the defendant, for the plaintiff. There were also accounts for goods sold and delivered, and the common money counts. The cause was tried before Lord Chief Justice Gibbs, at Guildhall, at the sittings after last term, when it appeared, that it was verbally agreed between the plaintiff and the defendant, that the latter might sell silk to any person he might select, at six months credit; and that he was to guaranty the amount for which such silk might be sold, on his receiving a *del credere* commission, at two and a half per cent. — It was further proved, that he sold silk to the amount of £167: 12s.: 3d., and that the plaintiff had paid him the commission agreed on. The persons to whom the defendant had sold the silk having become insolvent, the plaintiff sought to recover the amount from the defendant. His Lordship considered that the declaration was insufficient, the plaintiff's claim having arisen from a contract of the defendant, to guaranty the solvency of the purchasers, on receiving a *del credere* commission.

Mr. Serjt. Best now moved for a rule, *quia*, that the nonsuit might be set aside, and a new trial granted, on the ground that the guarantie, being merely verbal, was void by the statute of frauds, and that a commission *del credere*, being an absolute engagement, or original undertaking, did not amount to a guarantie, and, therefore, was not required to be in writing, and consequently that the declaration was sufficient. He relied on the judgment of Lord Mansfield, in *Grove v. Duke* (a).

Lord Chief Justice GRANT. — Even if you establish the latter point, the plaintiff will be in the same situation. Although a broker be liable, in the first instance, it

(a) 1 T. R. 118. See also, *Rice v. Dickson*, *Hid.* 265.



1817.  
 WALKER  
 v.  
 LALING.

rity of the case of *Matthew v. Sherwell* (a).—His Lordship considered, that as the only title, which the assignees had to these bills, was on their being the property of the bankrupt, who had no authority to draw them, nonsuited the plaintiffs.

Mr. Serjt. *Best* now moved for a rule nisi, that this nonsuit might be set aside, and a new trial granted. He contended, that *Matthew v. Sherwell* was a case wholly distinguishable from the present; as it was there decided that an action of trover was not maintainable by assignees against a creditor of a bankrupt, who had received payment of a cheque, drawn by the bankrupt on his bankers, and who retained such cheque after its payment.—That action was not brought until the amount of the cheque had been paid, which was therefore of no value to the assignees. In the present case, however, the bills were outstanding, and the acceptors being debtors to the bankrupt, were bound to pay them, as being a disposition of the bankrupt's property subsequent to his bankruptcy. The bills are valuable to the assignees, who are therefore entitled to recover them in this action. No other action can be maintained by them. In the case of *Wilkins v. Goss* (b), it has been held, that if a man, who has funds in his hands belonging to a trader who has committed an act of bankruptcy, accept a bill drawn by that trader without knowing of such act of bankruptcy, he may apply those funds, when the bill becomes due, to the discharge of his own acceptance, though a commission may have issued in the mean time, and will be protected against any claims the assignees may afterwards make upon him for those funds.—[Lord Chief Justice *Gibbs*.—That is protected by the statute of James the first.—A debtor may pay a bill, notwithstanding an act of bankruptcy, of which he

(a) 2 Tass. 439.—(b) 7 T. R. 711.

is ignorant. If the debtor of a bankrupt engage to pay, it has in fact the same effect as if he had actually paid. A banker may make a payment to a bankrupt, of any part of his cash balance, if he be not aware of the bankruptcy. So, if the bankrupt draw a cheque on his banker, who is ignorant of the bankruptcy, the banker may pay such cheque. A person, before he become bankrupt, may dispose of every species of property which may be due to him from third persons. If this action be not maintainable, the bankrupt might have drawn on his creditors for all debts due to him after his bankruptcy, and such payments would have been protected by the statute. That, however, is impossible. It would be repugnant to the bankrupt laws. In *Matthew v. Sherwell*, the debt was contracted, and the payment made after the bankruptcy was known. The bills in this case were of value, because they were a valid assignment of property. The acceptors have no defence against a subsequent holder; and, therefore, they cannot be called on to pay the assignees, to whom they are not liable. The value of the bankrupt's estate is diminished, as these bills form a part of his property. Unless the acceptors could defend an action brought against them, by a subsequent holder, these bills are recoverable by the assignees of the bankrupt. This principle is recognized in the case of *Willis v. Brown (a)*, where the ground of decision was, that the assignees had no right to obtain a bill from the defendants in opposition to the plaintiff, who claimed by an immediate indorsement from the bankrupt; but the court did not determine that a subsequent indorsee for a valuable consideration could not claim. So, in *Arden v. Whiston*, it was held; that if a man accept a bill for the accommodation of a trader, who has committed a secret

1817.

WALKER  
v.  
LAING.



1817:  
WALKER  
v.  
LAMB.

act of bankruptcy, and such bill be payable to the trader's order, the trader's indorsee will have a valid claim upon the bill against the acceptor notwithstanding a commission of bankrupt shall have issued against such trader before the bill became due. In this case, however, the defendant had no right to retain the bills, which were in fact, the property of the assignees. No discharge, after an act of bankruptcy, can make a payment good; and therefore, such payment be protected by the statute, it may be recovered by the assignees. The defendant had a knowledge of the insolvency, but not of the act of bankruptcy. [Lord Chief Justice Gibbs.—Yet these bills being over-due were worth nothing, at the time this action was brought. They were not in the hands of a third person, but remained in the possession of the defendant.] One of the bills was not over-due at the time the action was commenced, and was therefore of value to the assignees. If the defendant, as holder of these bills, had received money on them from the acceptor, he would be liable to the assignees for money had and received; but as he would have received the money on them, being aware of the bankruptcy. This, therefore, is the only action which could be brought by the assignees, as the bills were indorsed by the bankrupt to the defendant, who was a bona fide holder, and could only resort against the acceptor. The bankrupt having made a transfer of his property, by these bills, before the act of bankruptcy to the defendant, who was apprised of this delivery, such transfer is not protected by the statute, and the bill can therefore be recovered in this action by the assignees.

Lord Chief Justice Gibbs. I shall leave my brethren to decide this point; and state the opinion soon. I directed a nunciatus nisi perit. That opinion was founded on facts, which have not been mentioned this day by my brother Best. He has stated generally, that an order

given to a debtor to pay money, after bankruptcy, conveyed no authority for enforcing the payment of such money; that is generally true: By the statute of James, which shows acts of bankruptcy committed, such order would be good, without knowledge of the act of bankruptcy; and it has been held, that if there were an undertaking, the obligation would be binding. If a bankrupt drew a bill on his banker, who was ignorant of his bankruptcy, and he accepts such bill, the banker would be bound to pay it, and would be protected by that statute, as if he had actually paid the money. But this is not the ground of my decision. I do not think that any thing could arise, if this action be not maintainable. My brother *Bent* has said, that a bankrupt, before his bankruptcy, may cause his property to be distributed, as he pleases; but this is not the case. If he give bills to persons who may do so, then the inference may be drawn, that if he give the bills to persons who ought not to have this distribution of his property, it may be recovered back by the assignees: If a debtor be improperly paid, the assignees have their remedy for the recovery of it. The question in this case is, whether the assignees have a sufficient property in these bills to maintain an action of trover, &c. It appears, by the evidence, that the defendant having provided himself with paper and stamps, drew the bills in question, and compelled the bankrupt to sign them, as if drawn by himself, as debtor to the defendant; and he is now the holder of the bills. This assignee may deny that the persons, to whom the bills were drawn, were indebted to pay. Had a subsequent holder paid the money, it might have been recovered back from the defendant. The bankrupt, before, or the assignee since the bankruptcy, had no property in these bills. Had the bills been good, the defendant would

1817.  
WALKER  
v.  
LAING.

1817.  
WALKER  
v.  
LAING.

have a right to receive the money; but if bad, and the defendant had played them off to an innocent indorsee, then an action would lie against the defendant, but in no case can an action of trover be supported.

Mr. Justice DALLAS.—I entertain no doubt on this question.—The point on which it rests is, in whom the property of these bills was vested. If it were not in the bankrupt, the assignees clearly are not entitled to maintain an action of trover. The bills were merely stamped paper, which the bankrupt never possessed, and which could not therefore pass to the assignees.

Mr. Justice PARK.—I entirely agree that these bills cannot be the property of the assignees, as they were never either in their or in the bankrupt's possession.

Mr. Justice BURROUGH.—A debt may pass to the assignees of a bankrupt by assignment. These bills were never in the possession of the bankrupt, and therefore could not pass. Though a chattel may pass, as a debt, still these bills were merely stamped paper; and therefore the direction of the Lord Chief Justice was perfectly correct.

Rule refused (a).

---

(a) Since this rule was refused, the assignees brought an action against the defendant for money had and received, in which they succeeded.

## TOUSSAINT v. HARTOP.

Tuesday,  
June 10th.

At the trial of this cause before Lord Chief Justice *Gibbs*, at the sittings at *Guildhall* after the last *Trinity* term, a verdict for the plaintiff, for £130 damages, was taken by consent, subject to the award of an arbitrator, to whom it was referred to inquire into and ascertain whether there was any petitioning creditor's debt, with liberty for such arbitrator to enlarge the time as he should think fit.—The defendant died on the 25th of *August*, 1816, and the arbitrator made his award on the 9th of *December* following, by which he found that there was a good petitioning creditor's debt, and ordered the verdict to be entered for the defendant. This award was afterwards made a rule of court.

Mr. Serjt. *Best* in the course of the last *Hilary* term had obtained a rule *nisi* to set aside this award, on the ground that the arbitrator's authority was determined by the death of the defendant, before the award was made. He also raised another objection, that under the terms of *nisi prius*, the arbitrator was not empowered to award a verdict for the defendant, which objection the court over-ruled.

Mr. Serjt. *Lens*, in the last term, shewed cause against the rule. He observed that the only question was, whether the death of the defendant in this stage of the proceedings put an end to the suit; and suggested, that the court of *King's Bench*, in the case of *Bower v. Taylor* (a),

Where a verdict was taken for the plaintiff, by consent, subject to the award of an arbitrator, such reference being authorised by an order of *nisi prius*, and the defendant died after the verdict, but before the award, and the arbitrator, after such death, made his award, ordering a verdict to be entered for the defendant.—*Held*, that such award was bad, as the death of the defendant was a revocation of the arbitrator's authority.

---

(a) *E. T. 35 G. 3.* See this case referred to in *Caldwell* on Arbitration, p. 30.

1817.

TOUSSAINT

v.

HARTOP.

took a distinction between a reference where the submission was merely the act of the parties, and where a verdict was taken subject to the award of an arbitrator, such reference being authorised by an order of *nisi prius*, subsequently made a rule of court, and they held that where a party had died after a verdict, but before any award was made, and the arbitrator proceeded to make his award, confirming the verdict with full notice of the death of the party, yet that the award had relation back to the time of the verdict, and was valid. If this award should be set aside, the defendant would lose the benefit given him by the stat. 17 Car. 2. c. 8 (a).—In the case of *Lee v. Lingard* (b) it was held, that where a verdict was taken *pro forma*, at the trial, for a certain sum, subject to the award of an arbitrator, the sum afterwards awarded was to be taken, as if it had been originally found by the jury, and the plaintiff was entitled to enter up judgment for the amount, without first applying to the court for leave so to do. The award of the arbitrator is made in substitution of the verdict of the jury, and gives the parties the benefit of the 17th of Car. 2; and the defendant having died, pending the award, the judgment may be entered, *nunc pro tunc*. The court will therefore infer that this award refers to the time when the verdict was taken by the jury.—The verdict of the jury is not sufficient to entitle the plaintiff to enter up judgment. The award of the arbitrator could alone enable him to do so. In the case of *Potts v. Ward* (c), a verdict was taken for the plaintiff, which the arbitrator awarded to stand.

---

(a) By which it is enacted, 'That the death of either party, between the verdict and the judgment, shall not hereafter be alleged for error; so as such judgment be entered within two terms after such verdict.'

(b) 1 E. R. 401.—(c) 1 Marsh. 360.

Mr. Serjt. *Best*, in support of the rule, insisted that the arbitrator having introduced a new verdict, after the death of the defendant which was a revocation of his authority, rendered the verdict of the jury wholly ineffective.—The party, in this cause, seeks to set aside the verdict of the jury, found for the plaintiff, after the death of the defendant. The statute of *Car. 2.* enacts, 'that the death of either party, after verdict, and before judgment, does not prevent such judgment from being entered up, within two terms after the verdict:' but the principal objection in this case is, that the arbitrator has completely changed the verdict, found by the jury.—Where a verdict is found for a party, in his life-time, still if he die before judgment, such verdict may stand; but it is not applicable to a verdict given by an arbitrator for a defendant: For the verdict of the jury has decided nothing, as the rights of the parties were to be determined afterwards. The statute, therefore, cannot apply, and the rule must consequently, be made absolute, saving the usual assent to the award.

Lord Chief Justice *Campbell*.—As it has been submitted that in the case of *Bower v. Taylor* in the court of King's Bench, have drawn a distinction between a reference, where a submission was merely an act of the parties, and where a verdict was taken, subject to the award of an arbitrator, such reference being authorised, by an order of *nisi prius*, subsequently made a rule of court; and this court having held in the case of *Bow v. Ward*, that the death of one of the parties, at any time before the award made, is a revocation of the arbitrator's authority;—it is necessary that we should communicate with that court, before we give our opinion.—There are difficulties attending this case, which cannot easily be got over. I cannot but consider, that the death of one of the parties, at any time before an award made, is a revocation of the arbitrator's

1817.

TOUSSAINT  
HARTOP.

1817.  
 }  
 TOUSSAINT  
 v.  
 HARTOP.

authority; but as this decision in the court of *King's Bench* has been mentioned, I think this point deserves further consideration.

On this day, his Lordship delivered the following judgment of the court.

This was a question, whether on a verdict given at *nisi prius*, subject to the award of an arbitrator, the death of one of the parties, before the award made, revoked the arbitrator's authority. In the case of *Potts v. Ward* this court decided that it did. It has been insisted that it has been subsequently determined otherwise in the court of *King's Bench*; but no case has been found to warrant such an inference. We, therefore, think that the decision of this court is correct; and that this case is governed by the judgment given in that of *Potts v. Ward*.

*Per curiam.*

Rule absolute.

Wednesday,  
 June 11th.

BIRD v. DALE.

A game-keeper is not empowered to seize game, in the possession of an unqualified person, under a general direction given him by the lord of a manor, although such seizure were made within the manor.

THIS was an action of trespass, brought against the defendant, for seizing and carrying away three dead hares, and the baskets in which they were contained.—The defendant pleaded, *First*, the general issue, of not guilty: *Secondly*, as to the seizing, taking, and carrying away the hares;—that the Rev. *Peter Beauvoir* was lord of the manor of *Downham*, in *Essex*, and that they were found in the possession and custody of one *James Britton*, within the

said manor, who was then the servant of the plaintiff; that neither the plaintiff nor *Britton* were duly qualified to kill game; and that *Britton* having the hares in his custody and possession within the manor, the defendant, as the servant of the said *Peter Beauvoir*, as lord of the manor, and by his command, took away the hares from *Britton*, (he being a person not qualified to kill game, or have it in his possession), for the use of *Peter Beauvoir*, as lord of the manor, and delivered the same to *Beauvoir*, which he was lawfully authorised to do; and traversed the seizing and carrying away the hares out of the manor:—*Thirdly*, as to the seizing, taking, and carrying away the baskets; that the defendant, as the servant of *Peter Beauvoir*, by his command, and for his use, took away the hares from *Britton*; and because the hares were so enclosed, fastened, and sewed up in the baskets, and could not be taken out, without opening the same for that purpose, he necessarily took the baskets, for the purpose of taking out the hares, so enclosed therein, and detained the baskets for a short time;—that he opened the baskets, doing them no damage, took out the hares for the use of *Beauvoir*, and delivered them to him, and afterwards restored the baskets to the plaintiff:—*Fourthly*, as to the seizing, taking, and carrying away the hares in the baskets; that the hares were packed, enclosed, and sewed up in the baskets, which, together with the hares contained in them, were intended to be carried to certain persons to whom they were directed; and which baskets, containing the hares, so packed and directed, were found in the possession and custody of *Britton*, within the manor, he being the carrier of the same, and not qualified to kill game.—The plaintiff replied, that the defendant committed the trespass of his own wrong, and not as the servant, or by the command of *Beauvoir*, upon which issue was joined.—The cause was tried at the last assizes at *Chelmsford*, be-

1817.

BIRD

v.

DALE.



1817.

BIRD

".

DALE.

fore Mr. Serjt. *Bosonquet*. The only point in issue was, whether the defendant had made the seizure, by the command or authority of his master.—The plaintiff having proved the seizing and taking the hares and baskets by the defendant, it was submitted, by his counsel, that a game-keeper, in point of law, had no right or power, under any authority which could be given him, by the lord of a manor, to seize game, or engines for the destruction thereof, unless in the lord's presence. The counsel for the defendant stated, that he should be enabled to prove, that Mr. *Beauvoir* had given a general authority to the defendant, as his game-keeper, who was duly qualified, by deputation, to watch the conduct of the plaintiff, and to use every necessary means for the preservation of the game, within his manor;—but the learned serjeant held, that the mere proof of a general authority from the lord to seize game was insufficient; inasmuch as the defendant had pleaded a special justification, that he had been ordered to seize these identical hares; and it was therefore necessary for him to have shewn that he had either a specific authority, or an express command from Mr. *Beauvoir*, for this particular purpose.—The jury, therefore, under his direction, found a verdict for the plaintiff, damages 10*s.* : 6*d.*

Mr. Serjt. *Onslow*, in the course of the last term, obtained a rule *nisi*, that this verdict should be set aside, and a new trial granted.

Mr. Serjt. *Best* now shewed cause against the rule, and observed, that the only question was, whether a lord of a manor could, by a general command, authorize his game-keeper to seize game from unqualified persons.—He submitted, that he could not, for the two following reasons: *first*, that the lord of a manor had no such power; and, *secondly*, if he had, that the defendant, in this case, had not properly exercised it. That part of the 4th section of

the statute 5 *Anne*, c. 14 (a), which authorises justices of peace, or the lords or ladies of manors, to take away game from higlers, or persons not qualified, as well as their dogs and nets, is intended to be confined solely to themselves, and such authority cannot be delegated to their game-keepers. The power granted to game-keepers to kill game is given in the latter part of that section (b), as well as a penalty inflicted on such game-keepers for selling game, when killed, without the consent of the lord of the manor.—This statute has therefore two objects in view; the one to empower lords of manors to take away game and nets from unqualified persons, and then points out what persons they are authorised to delegate, as game-keepers, who are merely empowered to kill game on their manors, and for their use.—By the 22d and 23d

1817.

BIRD  
v.  
DALE.

(a) By which it is enacted, "That it shall and may be lawful to and for any of her majesty's justices of the peace, in their respective counties, ridings, cities, towns corporate, or liberty, and the lords and ladies of his, her, their, or any of their respective manors within the said manor, to take away any hare, pheasant, partridge, moor-hen, game, or grouse, or any other game, from any higler, chapman, inn-keeper, victualler, or carrier, or any other person or persons not qualified to kill the same, and shall be found in their custody or possession; and likewise to take away such dogs, nets, or other engines, which shall be in the custody or power of any person or persons (not qualified by the laws to keep the same) to their own proper use, without being accountable to any person or persons for the same."

(b) "And that it shall and may be lawful for any lord or lady of his or her respective lordship or manor, by writing under his or her hand and seal, to empower his or her game-keeper or game-keepers, upon his or her own lordship or manor, to kill hare, pheasant, partridge, or any other game, whatsoever; but if such game-keeper shall, under color or pretence of the said power or authority to kill, or take the same for the use of such lord or lady, and afterwards sell and dispose thereof to any person or persons whatsoever, without the consent or knowledge of the lord or lady of such manor or manors, that hath given such power or authority, and shall be thereof convicted, upon the complaint of such lord or lady of any manor, and upon the oath of one or more credible witnesses, before any one or more of her majesty's justices of the peace, upon such conviction, such game-keeper shall be committed to the house of correction, for the space of three months, and there kept to hard labour."

1817.

BIRD  
v.  
DALE.

*Car. 2, c. 25, s. 1. (a)*, game-keepers are empowered merely to seize engines for the destruction of game, but not the game itself, although dead.—Lords of manors, therefore, are not authorised, by either of these statutes, to empower their game-keepers to seize game.—*Secondly*, even supposing they were, the defendant, in this case, has not duly exercised this power. He adduced no evidence to shew that Mr. *Beauvoir* had authorised him to seize the hares in question, either by written or parol orders. If the lord of the manor be legally authorised, and the defendant has seized this game, without his specific authority, it cannot, for a moment, be contended, that he was warranted in such seizure; although the person from whom he took it were unqualified.

Mr. Serjt. *Onslow* and Mr. Serjt. *Pell*, in support of the rule, remarked that the only point in issue was, whether the defendant, under the general authority of Mr. *Beau-*

---

(a) By which it is enacted, "That all lords of manors, or other royalties (not under the degree of an esquire) may from thenceforth, by writing under their hands and seals, authorise one or more game-keeper or game-keepers, within their respective manors or royalties, who being thereunto so authorised, may take and seize all such guns, bows, grey-hounds, setting-dogs, lurchers, or other dogs, to kill hares, or conies; ferrets, tramels, low-bells, hays, or other nets; hare-pipes, snares, or other engines, for the taking and killing of conies, hares, pheasants, partridges, or other game, as within the precincts of such respective manors shall be used by any person or persons, who by this act are prohibited to keep or use the same. And, moreover, that the said game-keeper or game-keepers, or any other person or persons, being thereunto authorised by warrant, under the hand and seal of any justice of the peace of the same county, division, or place, may, in the day-time, search the houses, out-houses, or other places, of any such person or persons, by this act prohibited to keep or use the same, as upon good ground shall be suspected to have or keep in his or their custody, any guns, bows, grey-hound, setting-dogs, ferrets, conie-dogs, or other dogs, to destroy hares, or conies, hays, tramels, or other nets; low-bells, hare-pipes, snares, or other engines aforesaid; and the same, and every or any of them, to seize, detain, and keep, to and for the use of the lord of the manor, or royalty where the same shall be so found or taken, or otherwise to cut in pieces or destroy, as things by this act prohibited to be kept by persons of their degree."

*vair*, could justify the seizure, as his game-keeper; and contended that as lords of manors were authorised by the stat. of *Car. 2*, to empower game-keepers to seize guns and other instruments, used for the destruction of game, that a general direction from such lords to their game-keepers for the seizure of game, was sufficient, without a specific order. This question, however, depends on the statute of *Anne*, by which lords and ladies of manors are empowered to seize game in the possession of unqualified persons. This statute will be wholly ineffective, if their game-keepers be not entitled to make such seizure of game.—It has been insisted, that a seizure, by a game-keeper, can only be made in the presence of a lord of a manor, unless he give a specific direction to his game-keeper for that purpose. This is not a mere naked power, given to a game-keeper; the statute of *Charles* has empowered game-keepers to seize guns from unqualified persons, by a specific authority in writing from the lords. It must be inferred, by the statute of *Anne*, that they are empowered to seize game, under a general order. The legislature, in the latter statute, could not have contemplated that the personal exercise of the lords and ladies must be resorted to. It is nugatory to suppose, that they must be present at such hours as poachers are generally in the habit of taking game. A game-keeper, therefore, having a general direction from his lord for the seizure of game, comes within the meaning of the statute of *Anne*. It should have been submitted to the jury, whether such general authority were sufficient. The statute of *Anne* should have a liberal construction, considering the nature of the offence prohibited, and the property protected by that statute.

Lord Chief Justice GIBBS.—This was an action of trespass, brought against the defendant, for seizing three dead hares, and the baskets containing them. He has

1817.

BIRD

v.

DALE

1817.  
 BIRD  
 v.  
 DALE.

pleaded, *first*, the general issue.—This plea is entirely out of the case, as the seizure has been duly proved. He then pleaded a justification, by authority of the statute of 5 *Anne*, c. 14, s. 4; that he seized the hares as the servant, and by the command of *Peter Beauvoir*, clerk, who was then lord of the manor of *Downham*, and that the hares being packed in baskets, he opened them, took the hares out, and returned the baskets to the plaintiff.—The issue joined is, whether the defendant did this by the command of Mr. *Beauvoir*. That, in fact, is the only point to be considered. It was incumbent on the defendant to have proved not only that he was the servant of Mr. *Beauvoir*, and was authorised by him to seize game; but in order to support his justification, he should have proved such a specific command of Mr. *Beauvoir*, to empower him to make this seizure, as would be sufficient to enable him to defend this action. Instead of this, he has adduced no evidence to shew that he had a specific or particular order from Mr. *Beauvoir* to make this seizure. He merely offered to prove a deputation and a general direction from Mr. *Beauvoir*; what the terms of that general direction were, are unknown; but he was certainly not specifically directed to make the seizure in question. The words of the statute of *Anne*, under which alone any seizure can be made, empower justices of the peace, &c. to take away, &c. from persons unqualified. Justices of the peace may do this, lords of manors may do this. They may seize game, either by themselves or others, whom they may authorise to do acts which they may direct. They are to judge whether the person in whose custody game may be found is qualified or not. When they are satisfied that such person is unqualified, then they may direct a third person to seize; but they cannot give such third person a general direction to do so, because it deposes to such third person, whom

the lord of a manor may direct, that discretionary judgment which the legislature directed to be exercised by themselves, viz. to ascertain whether the person from whom the seizure is to be made be qualified or not. The defendant adduced no evidence to shew that he was specifically authorized by Mr. *Beauvoir* to seize those hares from the person in whose possession they were found. The first question to consider is, whether a deputation vested this authority in the defendant. By the statute 22 and 23 *Car. 2. c. 25, s. 1*, a written authority is given to game-keepers to seize guns; but the deputation under that statute does not confer on them the power of seizing game. The statute of 5 *Anne, c. 14, s. 4*, does not authorise them to seize game, but vests such power in justices of the peace and lords and ladies of manors. The defendant was only prepared to prove that he had general directions from Mr. *Beauvoir* to seize game.—He had not even a direction to seize it from unqualified persons in whose possession it might be found;—such order therefore is not sufficient. Another ground exists, that a game-keeper is not entitled to use his discretion from what persons game may be seized. The evidence, therefore, which has been offered to be adduced, was insufficient to prove the fact which the defendant had put in issue, that he seized the hares by the command of Mr. *Beauvoir*; and as he could not prove that such command was specific, he was not justified in making the seizure.

Mr. Justice DALLAS.—This is a power given by the statute of *Anne* to seize game from persons unqualified, which I do not think should receive a liberal construction; but, on the contrary, should be strictly followed. The first question arises on the 4th section of the 14th of *Anne*, which confines such power to justices of the peace and lords and ladies of manors;—in strictness, therefore, they

1817.

BIRD

v.

DALE.

1817.

BIRD

v.

DALE.

have a mere personal authority: but it is not necessary to go to that length. Lords of manors cannot extend their power beyond the necessity of the case. It is indispensably necessary that orders should be given by them applicable to the identical persons from whom game might be seized. I shall confine my opinion to this point; and as no specific order was given by Mr. *Beauvoir* to the defendant, I think that the verdict given by the jury is correct.

Mr. Justice PARK. This power is given by statute.—By 22 and 23 *Car.* 2, lords of manors have power to appoint game-keepers, and may, by writing under their hands and seals, authorise them to seize dogs; but no power is given them, by that statute, to seize game. Has the statute of *Anne*, therefore, given them such power?—Certainly not, for by the 4th section of that act, they are merely empowered to kill game, and not even to seize dogs;—the lords and ladies of manors only can seize game. This being a penal statute, suppose it were to receive a liberal construction,—any other servant, than a game-keeper, might seize game. A mere general direction to seize game, was all the proof on the part of the defendant, in support of his justification. He admitted that he could not prove that a specific authority was given to him to seize the hares in question; and, therefore, having failed to establish his statement on the record, that he acted as the servant of Mr. *Beauvoir* and by his command, this rule must be discharged.

Mr. Justice BURROUGH.—It is quite clear that it was incumbent on the defendant to have proved his authority for making the seizure, and it was further necessary for him to have shewn that a specific authority was given to him for this purpose. Suppose the action were brought against Mr. *Beauvoir* for the improper conduct of the defendant, can it be contended that the former would be so con

nected with the defendant as to be liable in an action brought against him, if these hares had been unlawfully seized?

1817.

BARD

v.

DALE.

Rule discharged.

LEDWICH, Gent., one, &c. v. PRANGNELL.

Friday,  
June 13th.

Mr. Serjt. *Pell*, on a former day in this term, had obtained a rule *nisi*, that the service of the writ of attachment of privilege issued in this cause, and the subsequent proceedings thereon, should be set aside for irregularity, with costs. It appeared by affidavits, in support of his motion, that the defendant was, on the 25th of *January* last, served with an attachment of privilege, in the county of *Middlesex*, which was directed to the sheriff of *London*; and that on the 20th of *May* following, he was served with a notice of declaration.

If a defendant be irregularly served with process, he may apply to set aside the proceedings, although the plaintiff may have entered an appearance for him, and served him with a notice of declaration and given him a rule to plead.

Mr. Serjt. *Vaughan* now shewed cause on an affidavit of the plaintiff's, which stated that the defendant was indebted to him for business, as an attorney, and that he issued an attachment of privilege, directed to the sheriff of *London*, on the 24th of *January*, which was served on the defendant the following day. That on the 11th of *February*, the defendant applied to him, to ascertain the amount of the debt and costs, but did not complain of any irregularity in service of the process.—The plaintiff took no further proceedings, until the 19th of *April*, when he caused an appearance to be entered for the defendant according to the statute, and filed his declaration,



1817.  
  
 LEDWICH  
 v.  
 PRANGNELL.

and on the 20th of *May*, served the defendant with a notice thereof, and on the first day of this term gave a rule to plead. He submitted, that the defendant was bound to object to the irregularity in the service of the process, in the first instance; and relied on the cases of *Fox v. Money* (a), and *Downes v. Witherington* (b); or that, at all events, the defendant should have applied to set aside the proceedings, prior to this term.

Lord Chief Justice GIBBS.—The practice of the *King's Bench* differs from this court; as there, a party must apply in cases of irregularity, within a reasonable time. In this court, after an irregular step is taken by one party, the other is not bound to apply to set it aside until further proceedings be had. In this case, no further step was taken by the plaintiff, until the first day of this term, which was no waiver of the irregularity.

Rule absolute.

---

(a) 1 *B. & P.* 250.—(b) 2 *Taunt.* 243.

Friday,  
 June 13th.

HARMER, and another, (assignees of EDWARD DAVIS, a bankrupt) v. GILBERT DAVIS.

A petitioning creditor cannot dispute the validity of a commission of bankrupt, sued out by himself, although in an action brought against him by the assignees, it appears, that on the balance of accounts, the bankrupt was indebted to such petitioning creditor, in a less sum than £100.

THIS was an action for goods sold and delivered.—The declaration contained counts for goods sold before and after the bankruptcy, and the common money counts. The defendant required a bill of particulars, under a judge's order, setting out the debtor and creditor account,

that on the balance of accounts, the bankrupt was indebted to such petitioning creditor, in a less sum than £100.

between the plaintiffs (as assignees) and himself, which was accordingly delivered, as follows :

To a moiety of the produce of one-eighth share of a lottery-ticket, which on the 18th of *January*, 1815, was drawn a prize of £200, and as first drawn above £25, was entitled to £10,000, making together £10,200; such eighth-share being £1275, to be divided between *Davis* the bankrupt and one ——— *Ridler*;—a moiety of which sum of £1275 (after deducting discount, commission, postages, and other expences), amounting to £624 : 15s. was, on the 25th day of *January*, 1815, received by the defendant, to the use of *Edward Davis*, before he became bankrupt; and for the recovery whereof, with interest, from the 25th day of *Jan.*, the present action was brought.

At the foot of this bill of particulars, it was stated, that the plaintiffs were ignorant that the bankrupt was indebted to the defendant in any sum of money, or that he had any countermand against the bankrupt, or against them as assignees; and, therefore, no credit account was given. The facts of the case, as they appeared at the trial, before Mr. Justice *Park*, at the last assizes at *Gloucester*, were these : About the time the lottery-ticket was drawn, various accounts subsisted between the bankrupt and the defendant, and the affairs of *Edward Davis* being deranged, in *February*, 1815, he became bankrupt, on a concerted act of bankruptcy.—The docket was struck, and the defendant, who was the petitioning creditor, proved a debt of £303 : 2s. : 2d., for money lent, and goods sold to the bankrupt.—It appeared on the bankrupt's last examination, that he had paid to the defendant the sum of £230, out of which he allowed the defendant £5 : 5s. for valuing the bankrupt's effects, which the defendant acknowledged, and admitted that £224 : 15s. belonging to the bankrupt, being the balance, remained in his hands. It was proved that the defendant had received £1249 : 10s.

1817.  
HARNER  
v.  
DAVIS.

1817.  
  
 HARMER  
 v.  
 DAVIS.

from his bankers, on the 25th of *January*, for the whole amount of the lottery-ticket, and that on the same day he paid *Ridler* one moiety, and the bankrupt the other.—A verdict, by consent, was taken for the plaintiffs for £224 : 15s., as the balance remaining in the defendant's hand, with liberty for the defendant to enter a nonsuit, on the two following points :—*First*, whether, under the circumstances, the plaintiffs' demand was consistent with their bill of particulars; and, *secondly*, whether there was sufficient evidence of a petitioning creditor's debt, (the defendant being such petitioning creditor, and at the time of the bankruptcy indebted to the bankrupt in £224 : 15s., which reduced his debt to about £79.)

Mr. Serjt. *Blaslet*, in the last term, had accordingly obtained a rule *nisi*, that a nonsuit might be entered, but as the court considered the plaintiffs were not strictly confined to their bill of particulars, they granted it on the latter ground only.

Mr. Serjt. *Lens* now shewed cause, and contended that the verdict found for the plaintiffs ought to stand, and that although the petitioning creditor's debt might be reduced to a less sum than £100, it could not invalidate the commission of bankrupt sued out by him. The defendant could not object to the commission in the first instance, and say he was not liable in this action for the moiety of the bankrupt's shares of the lottery-ticket, which he had received. The plaintiffs, therefore, having proved that the bankrupt's share of such ticket was in the possession of the defendant, he was *prima facie* liable to the assignees for the amount. It having appeared, by the depositions of the defendant, taken before the commissioners, that the commission of bankrupt had issued against his brother, who was indebted to him in the sum of £303 : 2s. : 2d., on which he established his debt as petitioning creditor; although such debt might

not be available to support the commission, it having been reduced by the payment of £224 : 15s. made by the bankrupt to the defendant, still it disabled the defendant from defending this action: although his debt be reduced to a less sum than £100, it cannot affect him as petitioning creditor. As the plaintiffs could not recover the moiety of the lottery-ticket, as it was proved the amount was paid to the bankrupt, prior to his bankruptcy, they resorted to the examination of the defendant before the commissioners, who admitted that there was a balance due to the bankrupt, of £224 : 15s., which the plaintiffs insist was on account of the lottery-ticket. The defendant, however, contends, that if such sum be deducted, it reduces his debt to about £79. But the defendant, as petitioning creditor, is estopped from so doing, as he cannot dispute the validity of the commission in this action, as although it might be invalid as to others, it cannot be considered so as to himself.

Mr. Serjt. *Blosset*, in support of the rule, contended, that this debt was extinguished. The defendant is not estopped from disputing or contradicting his debt, as petitioning creditor.—The jury found a verdict for the plaintiffs on a fact proved by the defendant, who had set it up. The case resolves itself into two points: the first, as to the amount of the petitioning creditor's debt, as sworn to; and, secondly, as to the debt proved under the commission.—*First*, on adverting to the defendant's examination it would appear that his debt was reduced to about £79.—The petitioning creditor is not bound to give an exact account, but merely to depose that the bankrupt is indebted to him in a sum exceeding £100 before the bankruptcy. The obvious meaning of this deposition is that on the balance of the whole of the accounts between the bankrupt and the defendant, it will appear that the bankrupt was indebted to him in a sum exceeding £100.

1817.  
HARMER  
v.  
DAVIS.

1817,  
 HARMER  
 v.  
 DAVIS.

The defendant swore, as petitioning creditor, that the bankrupt was indebted to him in £303 : 2s. : 2d. If, therefore, the sum of £224 : 15s., be deducted from that amount, the balance remaining would not be sufficient to support a commission ; and the defendant therefore had the option of placing the £224 : 15s. on one side of the account, or of appropriating it to the general balance. The defendant has not sworn that the sum of £324 . 15s. was due to the bankrupt on the balance of account ; neither has he acknowledged that such sum was received by him on account of the share of the lottery-ticket.—*Secondly*, with respect to the debt proved under the commission : if there were an existing debt due from the bankrupt to the defendant, as petitioning creditor, a payment after the bankruptcy will not extinguish such debt. This payment, therefore, may not only be reduced, but wholly extinguished. If the bankrupt were indebted to the defendant, as petitioning creditor, in the sum of £303 ; 2s. : 2d. at the time of issuing the commission, the sum of £224 : 15s. as acknowledged to be due from the defendant to the bankrupt, should have been set off, according to the statute 5 Geo. 2, c. 30, s. 28. The defendant has proved both the debtor and creditor accounts, and the balance of such account should have been struck between them.

Lord Chief Justice GIBBS.—The amount of the petitioning creditor's debt cannot be disputed in an action brought against him by the assignees of the bankrupt. The petitioning creditor is compelled by statute to make oath that the bankrupt is indebted to him to the amount of £100; and, therefore, it is not open to him to controvert the commission.

Mr. Justice DALLAS.—Although I entertained some doubt, during the argument, I am of opinion that the decision of the Lord Chief Justice is perfectly correct.

Mr. Justice PARK.—This was not a disputed commission, neither did it appear that the debt was not a valid and existing one. It was, in fact, admitted under the proceedings. The result appears to be, that a petitioning creditor cannot dispute the validity of a commission of bankrupt sued out by himself. A petitioning creditor, having sworn to the amount of his debt, cannot contend, that the bankrupt, after having committed an act of bankruptcy, is not liable to him to that amount.

Mr. Justice BURROUGH entertained the same opinion.

Rule discharged.

1817.

HARMER

v.

DAVIS.

POWELL v. GRAHAM, executor, &c.

Saturday,  
June 14th.

THIS was an action of *assumpsit*, brought against the defendant as the executor of *John Graham*, deceased. The declaration contained nine counts.—The first of

In an action against an executor, on an account stated of monies due from him as

such, he is personally liable; but if an account be stated with him, as executor, of money due from the testator, he is liable in his representative character only:—Therefore, a declaration containing nine counts, the first five of which stated promises to be made by a testator; the sixth and seventh, promises by a testator, that his executor should pay, and that the defendant, as executor, became liable; the eighth, a promise by a testator, that his executor should, in a reasonable time after his decease, as such executor, pay the plaintiff, a certain sum, who averred that the defendant had notice thereof after the testator's death, by reason whereof, and of the reasonable time being elapsed he became liable; and the ninth an account stated between the plaintiff and defendant as executor, after the death of the testator of money due from him as executor to the plaintiff; to which declaration the defendant demurred generally, on the ground of *misjoinder*.—*Held, first*, That there was no *misjoinder*, as neither of the counts made the defendant personally liable, since the money, if recovered, would be assets in his hands; and, that the plea of *plene administravit*, and the judgment *de bonis testatoris* would apply to all. *Secondly*, if the defendant demur generally, to all the counts in a declaration, judgment must be entered for the plaintiff on such of them as are good.—*Scilicet*, If a testator promise that his executor shall pay a certain sum of money, after his decease, the plaintiff need not aver in his declaration that the defendant had assets, or that he promised as executor to pay.

VOL. I.

X

1817.  
POWELL  
v.  
GRAHAM.

which stated, that the testator was indebted to the plaintiff for wages due to her as his servant, and averred a promise to pay by him in his life-time. The *second* count was for work and labour generally, with a like promise by the testator. The *third*, *fourth*, and *fifth*, were for money paid, had and received, and on an account stated, containing like promises by the testator. —As to these *five* counts, the plaintiff assigned for breach, that such payments had not been made either by the testator, in his life-time, or by the defendant, (as his executor) since his decease. The *sixth* count stated, that in consideration that the plaintiff, in the life-time of the testator, would enter into his service as a nurse and house-keeper, and continue in such service until his death, for certain wages to be paid her by the testator, he promised her that his executors, after his decease, should pay her the sum of £20. The plaintiff averred, that she entered into the service of the testator as nurse and house-keeper, and continued to serve him as such until his decease; by reason whereof, the defendant, (as executor) became liable to pay her the said sum of £20, and promised accordingly. The *seventh* count was similar to the last, on an executed consideration; and the *eighth* stated, that in the life-time of the testator, in consideration that the plaintiff, at his request, was then in his service as an hired servant, and would be in his service as such servant, at the time of his death, he promised the plaintiff, that his executor or executors should, in a reasonable time after his decease, as such executor or executors, pay the plaintiff the sum of £20, besides wages; and the plaintiff averred that she was in the service of the testator at the time of his death, whereof the defendant, as executor, after the testator's death had notice, by reason whereof and of the reasonable time being elapsed,

the defendant became liable, as executor, to pay the plaintiff. The *ninth* count stated, that the defendant, as executor, after the death of the testator, accounted with the plaintiff concerning other sums from the defendant, as executor, before that time due and owing to the plaintiff, and undertook as executor to pay. *Breach*, that the defendant, executor as aforesaid, had not paid the three last-mentioned sums of money,—To this declaration the defendant demurred, and assigned for cause, that the several counts of the declaration, and the supposed causes of action therein mentioned, were misjoined, inasmuch as the last count of the declaration stated a contract and cause of action not arising until after the death of the testator; although the several other counts were, upon supposed contracts, made in the life-time of the testator. The plaintiff joined in demurrer.

Mr. Serjt. *Best*, in the last term, was called on by the court to support the declaration. He contended, that as well, by former decisions in this court, as in the court of *King's Bench*, the counts in this declaration might be joined.—If separate and distinct causes of action be joined in a declaration against an executor, and the plea of *plene administravit*, and the same judgment will apply to the whole of the declaration, no misjoinder of action can arise;—this point has been already expressly determined. An account stated is no new cause of action, but merely the acknowledgment of an old one. In *Secar v. Atkinson* (a), the plaintiff accounted with the defendant, as administratrix, of and concerning divers sums of money owing from the intestate to the plaintiff, and that the defendant promised payment, as administratrix. The declaration, in that case, was similar to the present.—According to the authorities of that case, and *Rann v.*

1817.  
POWELL  
v.  
GRAMAM.

---

(a) 1 H. B. 102.



1817.  
 POWELL  
 v.  
 GRAHAM.

*Hughes* (a), the judgment on all the counts in this declaration would be *de bonis testatoris*. In *Ellis v. Bowen* (b), an account upon a promise by the defendant, as executor, to pay money, in which he was found in arrear, upon an account stated between him and the plaintiff, of money due from the testator, might be joined with counts upon promises made by the testator in his life-time; and Chief Baron *Macdonald* there held, that "where there are distinct counts, which charge the defendant's liability, as executor, and another count which charges a promise by the defendant, in the character of the testator, that the same pleas and the same judgment will apply to all; and that the plea, that the defendant did not promise, is in effect, the same as that the testator did not." These cases, therefore, establish the distinction between that class, in which it has been laid down, that counts for goods sold, or money had and received by the defendant as executor, and others in his own right, cannot be joined. [Lord Chief Justice *Gibbs* referred to the case of *Brigden v. Parkes* (c).—That case cannot be reconciled with the present, as an account was there stated, by the defendants, '*executors as aforesaid*,' which was therefore merely descriptive of character; but the count in this declaration is upon an account stated by the defendant as executor. [Lord Chief Justice *Gibbs*.—That case was not decided on this ground, but it was insisted by the plaintiff, that the misjoinder could only be taken advantage of on special demurrer.]—That case comes within *Jennings v. Newman* (d); but this question is within the principle laid down in *Rann v. Hughes*, as the defendant might plead *plene administravit* to the last, as well as to the other counts, and the judgment *de bonis tes-*

---

(a) 7 T. R. 350, note.—(b) *Forrest*, 98.—(c) 2 B. & P. 244.—(d) 4 T. R. 347.

*tatoris* might be given upon all; but if the money were received by the defendant, as executor, after the death of the testator, *plene administravit* could not be pleaded, as the cause of action would have arisen after the death. The objection here arises on the last count of the declaration only. If this count be bad, the seventh and eighth counts are equally so.

Mr. Serjt. *Vaughan*, in support of the demurrer, premised, that the eighth and last counts in the declaration were misjoined, inasmuch as the former did not state any promise by the executor to pay, nor was any breach assigned to that count for the non-payment.—In that count an averment of assets was also necessary. The last count, which states that the defendant, as executor, after the death of the testator, accounted with the plaintiff concerning sums of money due to him from the defendant, as executor, was also evidently bad, as it could not be joined with those preceding it. This case differs from these which have been cited in support of the declaration. In *Powley v. Newton* (a), it was held, that an executor might join a count on promises to himself, as executor, with counts on promises to the testator, when the sum recovered would be assets in his hands. The present case is, however, distinguishable from that, as the rule there laid down was applicable only to an executor, as a plaintiff, and does not therefore extend to an executor as a defendant. The law, as applied to the relative situations of plaintiff and defendant executors, creates the distinction.—Mr. Justice *Heslb* adverts to this difference, in his judgment in *Secar v. Atkinson*. A plaintiff executor is not liable to costs, when it becomes necessary for him to sue in that character; but a defendant executor has no such exemption (b). In *Ord v. Fenwick* (c)

1817.  
  
 POWELL  
 v.  
 GRAHAM.

(a) 2 *Marsh.* 147.—(b) See *Ehlers v. Mocato*, 1 *Salk.* 314.—  
 (c) 3 *E. R.* 107.

1817.  
 POWELL  
 v.  
 GRAHAM.

Mr. Justice *Lawrence* said, 'that in actions against executors, the judgment would be different on the different counts, charging them *as such*, and also in their own right.'—The case of *Secar v. Atkinson* differs from that of *Rose v. Bowler* (a). The former charged the defendant as administratrix, in her representative character, and the judgment might be entered on all the counts of that declaration, *de bonis testatoris*, and not *de bonis propriis*; but in *Rose v. Bowler*, an account was stated by an executor of monies due from him as such, as by such account he was made personally liable. So, the last count in this declaration makes the defendant personally liable; for he is not charged on a contract entered into by the testator, but on account of money due from him to the plaintiff, since the testator's death. In every count in this declaration, the defendant has been declared against as executor.—If an intestate die, possessed of a term for years, and the administrator, instead of selling the term, receive the rent for several years, this rent is part of the assets of the intestate; and yet if any portion of such rent be unpaid, the administrator need not, in an action to recover it, declare as administrator (b). The cases of *Secar v. Atkinson*, and *Ellis v. Bowen* are distinguishable from the present, as in those cases the defendant promised payment as executor, for money owing from the testator to the plaintiff.

[Mr. Justice *Burnough*.—Independently of the misjoinder, the sixth, seventh, eighth, and last counts of this declaration are radically bad. In the sixth count there is no breach assigned, as it was not one of the three last counts to which the general breach in the declaration is confined; neither can it apply to the five first, the seventh contains no averment of assets, neither

---

(a) 1 H. B. 108.—(b) Per Lord *Kenyon* in *Bollard v. Spencer*, 7 T. R. 359.

are assets averred in the eighth; nor is there, in that count, a promise by the defendant to pay; and on the ninth, the question of misjoinder arises. The defendant cannot be bound, as executor, unless he have assets in his hands.

Lord Chief Justice GIBBS.—The question to be considered is, whether, if the defendant had pleaded that he had no assets, the plaintiff would have been prevented from taking judgment of assets *in futuro*.—This was a promise made by a testator, that his executor should make a certain payment after his death; the executor having proved the will, might have defended this action with success, if he had no assets in his hands. The promise having been made by the testator, the defendant, if he had assets, would be liable. Had he received assets to a certain amount, he might have so pleaded. The only doubt which remains in this case is, whether it be necessary for the plaintiff to state, in his declaration, that the defendant had assets, as in an action for goods sold and delivered. Every consideration is due to the difficulty which has been raised respecting the misjoinder, but the objections suggested by my brother *Burrough* have not been considered.

On these grounds the case stood over for further argument until this day, when

Mr. Serjt. *Vaughan* in support of the demurrer, resumed, that the object of the eighth count was to charge the defendant, as executor, after the death of the testator, on a promise made by the testator, prior to his decease, and in which count no averment of assets was stated, neither was any promise made, by the executor, to pay. In the case of *Lee v. Muggeridge* (a), the plaintiff averred that the testatrix promised that her executors should pay a sum of money, secured by bond. That the testatrix died, after having made her will, and appointed the

1817.  
POWELL  
v.  
GRAHAM.

---

(a) 5 Taunt. 36.

1817.  
 POWELL  
 v.  
 GRAHAM.

defendants executors, who duly proved the same; that the money due on such bond, at the time of the death of the testatrix, was wholly unpaid, and that divers goods and chattels, of the testatrix, more than sufficient to pay the money secured at the time of her death, came to the hands of the defendants, as executors; that they had notice thereof, and were requested by the plaintiff to pay the money secured by the bond, according to the promise made by the testatrix in her life-time. There were other counts, in all of which assets were averred.—The cases of *Atkins v. Hill* (a), and *Hawkes v. Saunders* (b), may be deemed analogous to that of *Lee v. Muggenidge*, in all of which the declaration contained an averment of assets. In those cases therefore there were express directions for the defendants to pay from those assets, and if no assets came to their hands, the plea of *plene administravit*, would have applied to each. In, *Rann v. Hughes*, the declaration averred that the defendants intestate died possessed of effects sufficient to pay a sum which had been awarded to be due to the plaintiff's testator; that administration was granted to the defendant, who thereby became liable to pay the same, and promised payment accordingly. The averment of assets, therefore, in that case, would be surplusage; but in this declaration there is no such averment although it is necessary. The plaintiff must be entitled to the sum left her, either on an express or an implied promise of the testator. In *Deeks v. Strutt* (c), which was an action for the recovery of an annuity bequeathed to the plaintiff's wife, the declaration stated, that the testator bequeathed an annual sum to the plaintiff's wife; that he appointed the defendant executor, who proved the will, and averred that goods and chattels of the testator came to the hands of the defendant to be administered, sufficient to pay and satisfy all the debts of the

---

(a) *Cowp.* 284.—(b) *Ibid.* 289.—(c) 5 T. R. 690.

testator; that the defendant was possessed thereof, and became liable to pay, and averred a promise accordingly. The usual course of pleading, therefore, in cases similar to this, is to aver assets.—The eighth count in this declaration is clearly defective.—The liability of the defendant must attach, either on an express promise made by himself, or in consideration of an implied promise made by the testator. It contains neither a promise of payment, by the defendant, nor an averment that he had any assets, of the testator in his hands to satisfy such payment.—With respect to the misjoinder, the case of *Rose v. Bowler* is opposite to those of *Secar v. Atkinson*, and *Ellis v. Bowen*; and Mr. Justice *Heath*, in the former case said that, ‘although the defendants were declared against, as executors, in every count of the declaration, the latter were such as could only make them personally liable.’—So, the last count in this declaration renders the defendant personally liable. The case of *Brigden v. Parker*, is decisive to shew that this is a misjoinder, and the court there held, that such misjoinder was matter of general demurrer; that it might be alleged in arrest of judgment, or assigned for error. Mr. Serjt. *Williams*, in his learned note to the case of *Coryton v. Litbetys (a)*, refers to the case of *Brigden v. Parker*, and states that an *insimul computassent* of money due from a defendant, as executor, cannot be joined to a count on a promise made by the testator. As, therefore, the judgment on this last count must be entered *de bonis propriis*, although *plene administravit* might be pleaded to this, as well as to the whole of the counts in the declaration, it is a misjoinder; and the eighth count is clearly defective for want of an averment of assets, and a promise by the defendant, as executor, to pay.

1817.  
POWELL  
v.  
GRAHAM.

---

(a) 2 Wms. Saund. 117.

1817.  
 POWELL  
 v.  
 GRAHAM.

Mr. Serjt. *Best*, in reply.—The eighth count of this declaration is perfectly good, and could not have been framed otherwise.—The defendant demurred generally to the whole declaration. If, therefore, the eighth count be good, in point of law, the defendant could not have demurred to it, but only to such as were bad. Misjoinder vitiates every count in a declaration; but there can be no pretence to say that the eighth count is here misjoined, although in point of form it may be bad, and the plaintiff is therefore entitled to judgment. *Judin v. Samuel (a)*, *Powdick v. Lyon (b)*.—Although the eighth count may be bad, in point of law, it may still be joined; and no objection can therefore be taken to it by a general demurrer on the ground of misjoinder;—although the eighth count be defective, still it does not vitiate those which preceded it. The objections which have been raised to the 8th count are, that there was neither an averment of assets, nor a promise to pay by the defendant;—it was wholly unnecessary that assets should be averred. The cases cited in support of this argument, are wholly inapplicable, as far as they relate to assets. Unless the defendant, as executor, had assets, there could be no obligation for him to pay. It was therefore necessary for him to shew, that he had merely sufficient property to discharge the obligations binding on the testator, which must be satisfied before the payment of legacies. There can be no implied promise to pay a legacy;—the consideration must be stated: neither can there be a legal obligation to pay such legacy, until the specialty debts be discharged. It has been contended that it should have been stated, in the eighth count of the declaration, that the defendant had sufficient in his hands to discharge this legacy, and that he made an express promise so to

---

(a) 1 N. R. 43.—(b) 11 E. R. 565.

do. It is unnecessary to state either, as an executor is not bound to pay debts of a testator, unless he have assets. Both the surplus of assets, and the promise by the defendant, as executor, are matters of defence. It is impossible for the plaintiff to ascertain whether the defendant have assets in his hands or not, and it is therefore incumbent on the latter to prove that fact. In the case of a *post mortem* bond, the cause of action could not have been stated otherwise than in the eighth count of this declaration. No defect in form can be taken advantage of on general demurrer, but should have been specially alleged. In the eighth count an undertaking is stated by the testator for his executor to pay a sum of money to the plaintiff in a reasonable time after his decease, if she would live with him until that event happened;—the plaintiff having so done, the defendant thereby became liable to pay as executor. The promise, by the executor, is therefore unnecessary;—even if it were, it would be merely a matter of form, not of substance, and should have been specially demurred to. *Lee v. Mugeridge* was inapplicable to the present case, as the executors there had the means of payment; and the court did not decide on the question of assets, but merely that a moral obligation was a good consideration for the executors to pay on a promise made by the testatrix.—At all events there can be no misjoinder of the counts in this declaration;—they all state that the debt was due to the plaintiff from the defendant, as executor. The rule of law, as to misjoinder, is this: If the same plea can be pleaded, and the same judgment given to all the counts in a declaration, they are correctly joined. The plea of *plene administravit* may be pleaded, as well to the last, as to all the other counts of this declaration. The judgment can be entered for *the assets only*, and not *de bonis propriis*.

1817.

POWELL  
v.  
GRAHAM.



1817.  
POWELL  
v.  
GRAHAM.

No distinction can be drawn between *Secor v. Atkinson* and *Ellis v. Bowen* and the present case.

Lord Chief Justice GIBBS.—We are all of opinion, that the counts in this declaration are not misjoined; and therefore will trouble you no further on this point.—As to the question, whether the eighth count were good, my brother *Burrough* entertained an opinion which differed from mine. If the representative of a testator do not pay, it is not a breach of promise of the representative, but of the deceased. What is the remedy of the plaintiff? If the testator had made a promise for his executor to pay, and left sufficient assets to enable him so to do, the payment must be made; but the question is, in what manner? Unless there were a promise by the testator to pay, the executor cannot be bound. The plaintiff has his remedy therefore by bringing an action against the executor as such: treating it as a promise made by the testator to pay, and stating that the executor became liable to make such payment, as executor, that is from the testator's assets:—If the defendant, as executor, had no assets, he should have so pleaded. The plaintiff might then have taken judgment of assets *in futuro*. If the defendant were not liable as executor, the plaintiff would be without remedy. He cannot be charged in his own right, because he made no promise to pay; and he is not liable, as executor, unless he had assets. It seems to me therefore, that the eighth count of the declaration is good;—but if it be bad, the plaintiff might recover on all the other counts, which are good. The question, therefore, is, whether these counts are misjoined. All the counts of the declaration state a promise, either by the testator in his life-time, or by the defendant as executor after his death. Wherever a promise in a declaration is stated to be made by a defendant, as executor,

and if he be only answerable in that right, he can be charged only as such. The obvious reason for inserting such a count is this: it was formerly supposed that if the statute of limitations be pleaded, an acknowledgment by an executor, after the death of a testator, was admissible only upon such a count. That gave rise to inserting promises by the executor, as executor, subsequent to the death of the testator.—One circumstance, if attended to, would reconcile the cases which have been cited in support of the declaration with those on the other side; none of them charged a defendant further than a personal representative, and there is therefore no inconsistency between those cases and such as have been stated to be contradictory. A promise made by a defendant, *as executor*, after the death of the testator, does not render him liable *de bonis propriis*, but only in respect of the assets in his hands. Where an executor is charged, either for money had and received *by him*, money lent *to him*, or on an account stated of money due from him personally, he is personally liable; but an account stated, with an executor, *as such*, of money due *from the testator*, makes him liable in his representative character only. If this distinction be attended to, there will be no inconsistency in the principles on which the cases cited have been determined: I therefore think there is no misjoinder in any of the counts in the declaration, and that there is no ground for the demurrer.

Mr. Justice DALLAS was absent, from indisposition.

Mr. Justice PARK.—The misjoinder of the counts in this declaration is the only point which deserves consideration.—It is an established rule of law, that if the same plea can be pleaded, and the same judgment given on all the counts of the declaration, there can be no misjoinder. All the cases have been fully considered by

1817.

POWELL  
v.  
GRAHAM.

1817.  
  
 POWELL  
 v.  
 GRAHAM.

the Lord Chief Justice, and that of *Ellis v. Bowen* established that rule. The question is, whether the same plea may be pleaded, and the same judgment pronounced, on all the counts in 'this declaration. The plea of *plene administravit* might, I conceive, have been well pleaded to all. The nature of the debt is the principal thing to be considered. The distinction has been drawn, by my Lord Chief Justice, that money lent to an executor himself renders him personally responsible. If this distinction be attended to, the cases of *Secor v. Atkinson* and *Rose v. Bowler* are consistent. The justice of the case rests with the plaintiff. It is immaterial whether the eighth count in this declaration can be supported; but, for the reasons stated by my Lord Chief Justice, I am inclined to think it may; and as the plaintiff may plead the same plea, and enter up the same judgment on all the counts of the declaration, she is clearly entitled to recover.

Mr. Justice BURROUGH.—As the whole of this case turns on the misjoinder, it is immaterial to consider whether the eighth count in this declaration be good or bad. I take this to be a general principle of law, that a promise by a testator, for his executor to pay, is not binding on such executor; but that the plaintiff must go still further by shewing that the executor had the means of payment, *Losb v. Williamson* (a).—In *Perrot v. Austin* (b), where A. covenanted with B. to put his son an apprentice to C. or if not, that his executor should pay B. £20; and A. did not put his son an apprentice to C. and died, and B. brought an action of debt against the executors of A.; it was held, that such action was not maintainable, because it could not be a debt in the executor, where it was no

---

(a) 7 T. R. 351, note.—(b) Cro. Eliz. 232.

debt in the testator, and if one covenant to pay £10, debt is maintainable against him or his executor; but if he covenant that his executor shall pay £10, no action can be brought against him.—*Primâ facie*, an executor is not liable for promises made by his testator, but is only answerable for such part of the testator's property as may come to his hands after his decease. In *Lee v. Mugeridge*, the executors were held liable to pay, because the testatrix not only directed them to pay, but stated that they had sufficient property to do so. In this case, it has been stated, that the defendant's liability attached on the eighth count of the declaration, which, if bad, would be merely matter of law, and not of fact. That might be traversed, if this cause were to go down to trial, on the eighth count only. Unless the plaintiff shew, that the defendant had assets of the testator, she would not be entitled to recover. In this case no claim can arise on the promise made by the testator. He was merely conscious that the plaintiff was entitled to a sum of money in addition to her wages, which he directed his executor to pay after his death. In all the other cases the promise was complete, in the life-time of the testator. As the only point, in this case, is confined to the misjoinder in the counts of the declaration, I entirely concur in the opinions which have been given by the Lord Chief Justice and my brother *Park*.

Judgment for the plaintiff.

1817.  
POWELL  
v.  
GRAHAM.

Monday,  
June 16.

DONNE v. MARSH.

If a defendant obtain time to plead, in *Easter* term, under a judge's order, which does not extend to the first day of the following term, the plaintiff may enter up judgment, as of such following term, without having a new rule to plead.

IN this case, process was served on the defendant, returnable on the morrow of the *Ascension*, being the 16th of *May* in the last *Easter* term.—On that day, a declaration *de bene esse* was filed, and a rule to plead given as of the same term. On the 19th, the plaintiff consented to an order for time to plead until the 31st of *May*. On the 2nd of *June*, being the *essoign* day of this present term, the plaintiff entered an appearance for the defendant, according to the statute, and on the same day signed interlocutory judgment, as of this term, for want of a plea, without giving any new rule to plead.

Mr. Serjt. *Pell* applied for a rule to shew cause why this judgment should not be set aside for irregularity, inasmuch, as although there was a rule given to plead as of *Easter* term, yet the judgment was not signed of that term, but of the present: the judgment might have been signed as of *Easter* term, but not of this, without a new rule to plead. He relied on the case of *Taylor v. Slocomb* (a), where it was decided, that if a judge give time to plead till the first day of a subsequent term, when the time is expired, the plaintiff, in default of a plea, may sign judgment without giving a new rule to plead;—but in this case the rule expired two days before. He also cited *Impey's Practice* (b).

Mr. Serjt. *Best* shewed cause, in the first instance, and contended that the irregularity complained of had been waived, by the defendant's having obtained a summons for

---

(a) *Barnes*, 243.—(b) *C. P.* 6th edit. 218.

further time to plead, and relied on the cases of *Towers v. Powell* (a), and *Starkie v. Wilkes* (b).—In *Decker v. Shedden* (c) the practice was confirmed, and this court there made the distinction, that as the summons for further time to plead had not been followed up by an order, it did not waive the necessity of a rule to plead. In this case, there was an order, and therefore, such rule was unnecessary.

1817.  
DONNE  
v.  
MARSH.

Mr. Serjt. *Pell*, in support of the rule, insisted that this case was distinguishable from that of *Towers v. Powell*, as here, the plaintiff, in *Easter* term, served the defendant with a rule to plead as of that term. The obtaining an order for further time to plead, did not extend to the present term, as it was not so expressed in the order.

The court considering it doubtful, whether the practice extended to the dispensing with a rule to plead as in a rule to declare, took time to consider, and,

On this day, Lord Chief Justice *Gibbs* delivered the following judgment.

The question is, whether, under the circumstances of this case, a new rule to plead was necessary. There seemed to be a doubt as to the cases which have been decided upon this subject, until they were investigated. In *Starkie v. Wilkes*, the court of *King's Bench* decided, that a rule to plead was not necessary, where the defendant had obtained time to plead under a judge's order, but had neglected so to do. That decision was submitted to the consideration of this court, in the case of *Towers v. Powell*. They inferred that the same rule which applied to pleading, was strictly analogous to that of declaring, *viz.* That the plaintiff, having himself obtained time to declare, had no right to call on the defendant for notice. In principle, therefore, no distinction can be drawn between

(a) 1 H. B. 87.—(b) 1 *Crompt. Prac.* 166. S. C. 1 *Sell.* 2d edit. 301.—(c) 3 B. & P. 180.

1817.  
 ~~~~~  
**DONNE**  
 v.  
**MARSH.**

a rule to declare and a rule to plead, and as time to plead has been given to the defendant, under a judge's order, a new rule to plead is unnecessary.—But, on the defendant's swearing to merits, the

Rule was made absolute, on payment of costs.

Tuesday,  
 June 17th.

**FARQUHAR v. FARLEY.**

If a purchaser pay a deposit to auctioneers at the time of sale, in part of his purchase money, and bring an action against them to recover it back, in consequence of the vendor's not being able to make a good title, and such deposit be recovered from them,—the purchaser is entitled to interest on the deposit from the time the purchase should have been completed, and may recover it from the vendor on alleging the special damage in his declaration.

THIS was an action brought by the plaintiff, to recover back from the defendant the sum of £240, being a deposit paid by the former as the purchaser of a reversionary interest in *Bank* stock. It was stated in the first count of the declaration, that the defendant caused to be put up for sale, by public auction, a reversion in the moiety of £3500 *Bank* stock, subject to certain contingencies, under the condition, that the highest bidder should be the purchaser, and pay down a deposit of £20 *per cent.* in part of the purchase money, and sign an agreement for payment of the remainder, on having a good title. The plaintiff then averred, that he was the highest bidder, and declared the purchaser for the sum of £1240, and that immediately after the sale, he paid down a deposit of £20 *per cent.*, which amounted to £240, in part of the purchase money, and signed an agreement for payment of the remainder, which he offered to discharge, on having a good title.—The special damage alleged in the breach was, that by reason of a good title not having been made, the plaintiff not only lost and was deprived of the benefits which might

have accrued to him from the completion of the purchase, but also of the interest and benefit of the £240 for four years and thirty-two days, and was compelled to pay £10 about the investigating the title, and also the extra costs of an action, amounting to £20, which had been commenced and prosecuted by him against the auctioneers for the recovery of this deposit. The declaration also contained counts for money paid, had and received, interest, and an account stated. The defendant suffered judgment by default, and a writ of inquiry was accordingly executed. It was proved, by the clerk of the auctioneers, that the deposit paid by the plaintiff was £348, and as the sum stated in the declaration was £240, the secondary held, that the variance was fatal. The plaintiff then insisted that he was entitled to £49 : 1s. for the interest due to him on the deposit; but the secondary also held, that such interest could not be recovered against the auctioneers, and directed the jury to find 1s. damages, which they did accordingly.

Mr. Serjt. *Pell*, on a former day in this term, had obtained a rule *nisi* that the inquisition should be set aside, and a new writ of inquiry executed. He cited the cases of *Maberley v. Robins* (a), *Calton v. Bragg* (b), and *Cornish v. Rowley* (c).—[Lord Chief Justice *Gibbs*. I have a manuscript note of the latter case, in which no notice was taken of interest. The only point there was, whether a title not being made out by a given day, the plaintiff might avoid the contract.]

Mr. Serjt. *Blasset* now shewed cause, and submitted, that the plaintiff having brought an action against the auctioneers, in which he had recovered the amount of the deposit, could not maintain the present action against the

1817.  
  
 FARQUHAR  
 v.  
 FARLEY.

(a) 5 *Taunt.* 625.—(b) 15 *East*, 223.—(c) *MS. K. B. M. T.* 40 *Geo.* 3. *Vide Selwyn's Nisi Prius*, 4th Edit. 171.



1817.  
 FARQUHAR  
 v.  
 FARLEY.

defendant, as the vendor, since the plaintiff had relinquished any demand he might have as against him by the recovery of such deposit. The secondary was perfectly warranted in not admitting evidence to shew that the plaintiff was entitled to £49 : 1s. for interest on the £240, when it appeared by the declaration, that he had paid £248 as a deposit, and recovered this sum from the auctioneers; and that therefore the variance was fatal.—The defendant, having suffered judgment by default, has admitted no more than the original cause of action declared on. This demand therefore could not be considered as part of such cause of action. He cited the cases of the *East India Company v. Glover (a)*, and *De Gaillon v. L'Aigle (b)*. In this declaration several causes of special damage were alleged, some of which were good, and others bad. The secondary therefore was not bound to admit proof of such damage on those which were bad, and it could not be contended, that the plaintiff had a right to recover this sum for interest as special damage.—[Lord Chief Justice *Gibbs*. I think he might. My brother *Pell* has put it on this ground, and stated it to be a special damage; and therefore insisted that the plaintiff is, by law, entitled to it.] The question is, whether the plaintiff is entitled to recover interest as special damage from the vendor, the deposit having been returned to him by the auctioneers. It has been established by two cases, that an auctioneer is a mere stakeholder, and not to be considered as an agent for both parties, and is therefore liable to the purchaser for the deposit. In support of this proposition, he relied on the cases of *Burrough v. Skinner (c)*, and *Edwards v. Hodding (d)*. If therefore, an action is not maintainable against the vendor

---

(a) 1 *Str.* 612.—(b) 1 *B. & P.* 368.—(c) 5 *Burr.* 2639.  
 —(d) 1 *Marsh.* 377.

for the principal, he surely cannot be liable for the interest, which is merely accessory to the principal. The plaintiff has made his election by proceeding against the auctioneers, and having sued them for the deposit, has waived his right as to the interest against the vendor, and more particularly so, as he endeavoured to recover such interest from the auctioneers under the writ of inquiry.

Mr. Serjt. *Pell*, in support of the rule, observed that when a contract was broken, the plaintiff might shew the different species of damage he might have sustained by the defendant's non-performance of such contract. It was certainly doubtful whether the defendant could be deemed liable for interest if this could be considered as a loan of money; but the plaintiff here avers, that he has sustained special damage by the detention of the deposit. It has been urged, that if the plaintiff be entitled to interest, it must be recovered from the auctioneers, and not from the defendant; but it might be insisted, that the defendant only is liable as principal, and that the auctioneers acted merely in the capacity of agents.

The learned serjeant was proceeding in his argument, but was stopped by the court.

Lord Chief Justice GIBBS.—This was an action against a vendor, who effected a sale through the medium of his auctioneers.—The only question is, whether the plaintiff be entitled to interest, in the shape of damages, having declared specially for the non-performance of the defendant's contract. In many modern cases it has been laid down, that for money lent, or had and received generally, a plaintiff is not entitled to interest, if there be no stipulated time for the payment of the principal. These cases, however, relate merely to money transactions;—on that principle, the plaintiff, in this case,

1817.  
  
 FARQUHAR  
 v.  
 FARLEY.

1817.  
  
 FARQUHAR  
 v.  
 FARLEY.

(knowing that the auctioneers acted in the capacity of agents) could not recover interest in an action against such auctioneers, because there was no stipulation for payment between those parties, for the auctioneers were bound to hold the money, as stake-holders for the vendor and vendee. If the auctioneers had made interest on this money so deposited with them, it would be different;—but the plaintiff had clearly no claim against them for such interest. The question then is, whether, as the plaintiff could not recover it against these auctioneers, he is entitled to recover from the defendant. The plaintiff having deposited a principal sum, the defendant undertook to make a good title at a certain time, and derived profits from the enjoyment of such principal;—the contract, on his part, is not performed. The plaintiff is kept out of his money, and remains so: he then brings an action for not completing the contract, and has actually lost not only the use of his deposit, but all benefit which might result from the completion of the contract. This loss is occasioned by the defendant's not having performed his contract;—it has been established in several cases, that interest cannot be recovered *quasi* interest, unless the principal be made payable on a day certain. But the case of *De Bernales v. Wood* (a), is scarcely to be distinguished from the present;—there, the plaintiff alleged in his declaration, and proved, that he had lost the use of his money by the defendant's breach of contract. That was an action to recover back the deposit from an auctioneer, and went further than this case, for the plaintiff declared specially; and Lord *Ellenborough* said, “ We have lately held, that interest is not recoverable on money lent, without some evidence of a contract for that pur-

---

(a) 3 *Campb.* 238.

pose ; but I think the plaintiff here ought to be allowed interest as special damage, from the day when the purchase ought to have been completed,"—the jury gave their verdict accordingly. In this case, therefore, the plaintiff is entitled to interest by way of special damage ; and as the doctrine laid down in the other cases will not be contradicted or infringed on by this decision, I think there should be another inquiry.

Mr. Justice DALLAS was absent.

Mr. Justice PARK.—All the cases on this subject are collected in that of *Calton v. Bragg*, and Lord *Ellenborough* there held, that interest might run under special circumstances, from whence a contract for such interest was to be inferred, and his Lordship in *De Bernales v. Wood* draws the distinction between that case and *Calton v. Bragg*.—My Lord Chief Justice has put this case on its true ground, as it certainly cannot be considered to be merely a loan of money.

Mr. Justice BURROUGH.—This action turns on the special ground, as stated in the first count of the declaration. The case of *Calton v. Bragg*, and the authorities there cited, will remain wholly untouched by this decision, as the plaintiff's damage is truly stated in the declaration.

Rule absolute.

1817.  
  
 FARQUHAR  
 v.  
 FARLEY.

Thursday,  
June 19th.

BLENKINSOP v. CLAYTON.

The defendant, on the purchase of a horse, offered the plaintiff's servant a shilling to bind the bargain, which was returned.—*Held*, that this was not a sufficient compliance with the stat. 29 Car. 2, c. 3, s. 17.

If a person bargain with the servant of a vendor for the purchase of a horse, and desire such servant to deliver him at his stables at a certain time, and before its expiration shew the horse to a third person, who refuses to purchase:—*Qu.* Whether this will amount to a delivery within the statute. At all events, it is a question for the jury to determine.

THIS was an action of *assumpsit* brought by the plaintiff to recover the price and keep of a horse sold by him to the defendant.—The declaration contained counts for horses sold and delivered,—bargained and sold—horse-meat and stabling, and the common money counts.—The defendant pleaded the general issue. The cause was tried before Mr. Baron *Wood*, at the last assizes at *York*, when on the part of the plaintiff it was proved, that the defendant contracted with the plaintiff's servant at a fair, for the purchase of a horse for £45, and it was agreed that the horse should be delivered to the defendant in about one hour afterwards. That, after the expiration of the hour, the defendant (being a dealer in horses) was called on at his own stables, by the servant of the plaintiff, to know if he were ready to receive the horse. The defendant said he should have a vacant stall in about an hour, when he would take him; but before the expiration of that time he refused to do so. That, on the following day, the horse was taken back to the plaintiff, who ordered him to be returned to the defendant, who refused to receive him. That no money was paid on the sale of the horse, but that the defendant offered a shilling to the plaintiff's servant, which was not accepted. It was further proved, that the defendant told another horse-dealer, that he had purchased the horse, that he would suit him, and that he the defendant would take £5 for buying him. That the defendant took the horse from the stable, when the dealer discovered a swelling of the fetlock joint in one of the fore legs, and refused to purchase, and that this circumstance took place

after the defendant had made the contract, and before the expiration of the time for the delivery of the horse at his stables. On behalf of the defendant it was objected that this evidence was insufficient to effect a sale and payment of part of the purchase-money, or a delivery to constitute a valid contract within the stat. of 29 Car. 2, c. 3, s. 17 (a). The jury found a verdict for the plaintiff for £45, the price of the horse, and £10 for the keep. The learned judge, however, reserved the point, for the opinion of this court, whether this were a sufficient evidence of a sale and delivery, within the meaning of the statute.

1817.  
  
 BLENKINSOP  
 v.  
 CLAYTON.

Mr. Serjt. *Hullock*, in the last term, obtained a rule *nisi* that the verdict found for the plaintiff should be set aside, and a nonsuit entered, or that the verdict should be entered for the defendant.

Mr. Serjt. *Copley* now shewed cause, and submitted that the plaintiff was entitled to retain the verdict on two grounds; *first*, that the earnest of the shilling offered to the plaintiff's servant, by the defendant, was sufficient to bind the bargain, with reference to the statute of frauds, for that the parties must be supposed to be cognizant of the law laid down in that statute, and that although their intentions to comply with it were vague, still, it depended *quo animo* the shilling was offered, and that it was immaterial whether it were retained by the plaintiff's servant, or returned to the defendant. It is the custom in *Yorkshire* to complete bargains by striking them

---

(a) By which it is enacted, that "no contract for the sale of any goods, wares, and merchandizes, for the price of £10 sterling, or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part of payment, or that some note or memorandum, in writing, of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized."

1817.  
 BLENKINSOP  
 v.  
 CLAYTON.

off with a shilling; although no money was actually paid. [But the Court held, that the mere striking off a bargain with a shilling, could not confer a transmutation of property in such shilling, as the plaintiff's servant had merely a temporary possession of it, and then re-delivered it to the defendant, and that the custom of a county could not be the means of interpreting the statute of frauds.] With respect to the *second* ground, he contended, that the defendant's offering the horse for sale to another dealer, at an advance of £5, after having struck the bargain with the plaintiff's servant, was sufficient to complete the contract so as to satisfy the statute; and that no actual delivery was therefore necessary.—He cited the cases of *Chaplin v. Rogers* (a), and *Elmore v. Stone* (b), to substantiate the completion of a contract, by the defendant's exercising ownership without any actual delivery.

Mr. Serjt. *Hullock*, in support of the rule, contended as to the *first* point, that the statute of frauds, which required an equivalent to be given, or an actual delivery made, was imperative, and admitted of no doubtful construction; that, with respect to the payment to bind the bargain; although the parties might have intended that the contract should have been effective, still the basis of the agreement depended on the statute, which could not have been complied with, unless an equivalent had been actually given to bind the bargain. If the defendant had paid the price of the horse into the hands of the plaintiff's servant, and re-taken it, this would not have amounted to payment. This mode of striking a bargain, therefore, could not be considered as giving something in earnest, or in part of payment. With respect to the *second* point, the argument for the defendant was equally ill-founded; for by the words of the statute, the horse should have been actually

---

(a) 1 R. R. 193.—(b) 1 Tentr. 458.

received by the purchaser. It appeared in evidence, that the only act of ownership, which the defendant exercised over the horse, was by taking him out of the stable of the seller, and shewing him to a person whom he considered might become a purchaser; and even this circumstance took place before the time had elapsed when the defendant had agreed to take the horse into his own stable.

The learned serjeant was proceeding with his argument on the latter point, when he was stopped by the court.

Lord Chief Justice GIBBS.—The court feel somewhat embarrassed that it was not left to the jury, by the learned Baron, to say whether this was sufficient to constitute a delivery of the horse or not. In the case of *Chaplin v. Rogers*, Lord *Kenyon* grounded his judgment on the finding of the jury, as to a delivery and acceptance by the vendee. There is a distinction between this case and those which have been cited:—Whether the horse were delivered or accepted is a point on which the jury should have decided, and as that was not done, I think this case requires further investigation. It does not resemble that of *Chaplin v. Rogers*, as the stack of hay there remained stationary, and the seller did all in his power to complete the bargain. The circumstances here are strong;—the plaintiff was ready to deliver the horse, and waited only for the convenience of the defendant, who, in the mean time, went to the stable where the horse was, took him out, and shewed him to a person whom he considered might purchase, and to whom he offered him for sale; on receiving £5 for his bargain. The question therefore is, whether this was a sufficient possession; but as this fact was not left to the jury, I think there should be a new trial.

Mr. Justice DALLAS.—The only difficulty is, whether any thing remained to be done by the seller, or whether

1817.  
BLENKINSOP  
v.  
CLAYTON.



1817.  
 {  
 BLECKINSOP  
 v.  
 CLAYTON.

what he had done, through the medium of his servant, was sufficient to constitute a delivery. It is unnecessary now to consider this question, but for the reasons alleged by my Lord Chief Justice, I think there should be a new trial.

Mr. Justice PARK concurred.

Mr. Justice BURROUGH.—The only question is, whether this were a delivery or not. It certainly ought to have been left to the decision of the jury.

Rule absolute for a new trial.

Thursday,  
 June 19th.

EMMETT and another v. BRADLEY and others.

In an action against several defendants, as partners, for goods sold; some of whom pleaded bankruptcy, and others the general issue:—  
*Held*, that after the plaintiff had closed his case, and the bankrupt defendants had proved the bankruptcy, one of the bankrupts could not be admitted as a witness, to shew a dissolution of the partnership, prior to the delivery of the goods.

THIS was an action of *indebitatus assumpsit* for goods sold and delivered, and for work and labour.—The declaration contained the usual counts. There were five defendants, three of whom pleaded that they had become bankrupts before the cause of action accrued, and that the plaintiffs had proved their debt under the commission. The replication traversed the proof of the debt under the commission, but admitted such commission and the identity of the debt, and upon that traverse issue was joined. The other two defendants pleaded the general issue.

The cause was tried before Mr. *Baron Wood* at the last assizes for *York*, when, on the part of the plaintiffs, a deed, bearing date the 11th of *Aug.*, 1810, was produced, for the purpose of shewing that a partnership had existed between all the defendants up to that day, and that the goods, for the amount of which this action was brought, had been delivered to them by the plaintiffs, about the end of the year 1809. It was also proved, by several witnesses,

that the goods were furnished to all the defendants.—On behalf of the defendants, the proceedings under the commission were given in evidence, when it was submitted, by their counsel, that a verdict should be entered on that part of the record for the bankrupt defendants, with an intention of calling one of them as a witness, to prove that an instrument, dated in 1809, operated as a dissolution of partnership *quoad* those two defendants, who had pleaded the general issue, and that the deed of *Aug.* 1810 was only a disposition of the remaining property of the partnership.—The learned judge considered that the deed of *August*, 1810, was conclusive to shew that the partnership existed between all the defendants until that period, and refused to admit the evidence of one of the bankrupt defendants, who was called to deny the existence of the partnership in 1810. The jury found a verdict for the plaintiffs, against the two defendants, who had pleaded the general issue, and a verdict for the other three on their plea of bankruptcy.

Mr. Serjt. *Hullock*, in the course of the last term, obtained a rule *nisi*, that this verdict should be set aside, and a new trial granted. He founded his motion on two grounds; *first*, as to the misdirection of the learned judge, relative to the effect of the deed of *August*, 1810; and, *secondly*, the rejection of one of the bankrupt defendants as a witness. To shew the defendant's admissibility as a witness, he cited the cases of *Moravia v. Hunter* (a), *Noke v. Ingham* (b), and *Raven v. Dunning* (c).

Mr. Serjt. *Best*, (and Mr. Serjt. *Vaughan* was with him,) now shewed cause.

[It appearing that the learned judge left it to the jury to determine whether the deed of the 11th of *August*,

1817.  
EMMETT  
v.  
BRADLEY.

---

(a) 2 M. & S. 444.—(b) 1 Wils. 89.—(c) 3 Esp. 25. S. C. Append. *Peute Evid.* 4th edit. 87.

1817.  
 EMMETT  
 v.  
 BRADLEY.


1810, was sufficient to shew that the partnership between all the defendants continued to that day; the court held that there was not ground for setting aside the verdict as to the misdirection of the learned judge; and it is therefore unnecessary to state either the arguments or judgment of the court on that point.]

They then submitted, that the learned judge, under the circumstances of this case, was perfectly correct, in not allowing one of the defendants to be called as a witness; as the case on the part of the plaintiffs had closed, and the defendant's counsel had offered evidence to the court and jury in defence of that particular defendant, whom it was proposed to call as a witness. If the plaintiffs had made out no case, and no evidence had been offered against one of several defendants, a distinction might be drawn, but this rule cannot be carried further. Mr. Justice *Buller*, in his law of *nisi prius* (a), in treating of a defendant being acquitted for the purpose of being made a witness, says; 'This rule is to be understood 'where there is no manner of evidence against the defendant, for if there be, his guilt or innocence must 'await the event of a verdict.'—No verdict in favour of one defendant can be taken, so as to render such defendant capable to be examined as a witness for his co-defendants. The case of *Raven v. Dunning* (b) is precisely in point; as Lord *Kenyon* there held, that a witness, who was offered under circumstances similar to the present, was not admissible. If, therefore, there be any evidence adduced, for which the defendants are to answer before they are entitled to a verdict, no verdict can be taken for them, until the final event of the cause be known. As the counsel for the defendants had opened his case, and adduced evidence to prove the

---

(a) Page 285.—(b) 3 *Esp.* 25.

bankruptcy, the present bankrupt defendant could not be admitted as a witness, and the learned judge was perfectly correct in deciding that he was not admissible.

1817.  
  
 EMMETT  
 v.  
 BRADLEY.

Mr. Serjt. *Hullock*, in support of the rule, submitted that one of the defendants, who had pleaded his bankruptcy, was an admissible witness in that period of the case in which he was offered to give his testimony on behalf of his co-defendants, and that a verdict should then have been taken for him. The passage cited from *Buller's Nisi Prius*, which refers to the fact of no evidence having been given against a co-defendant, is totally inapplicable to the present case, for there it was deemed that such witness could not be received, because his name upon the record appeared to be the responsible person; but the former part of that passage states, 'that if any person be arbitrarily made a defendant, to prevent his testimony, the plaintiff shall not prevail by that article, but the defendant, against whom nothing is proved, shall be sworn notwithstanding, for he does not swear in his own justification, but in justification of another.' The evidence which was given for the defendants, previously to the testimony of one of the bankrupt defendants having been offered, was immaterial.—[Lord Chief Justice *Gibbs*.—The object of the evidence intended to be adduced was to destroy the partnership, by which the defendants furnished themselves with a defence to this action, independent of the bankruptcy.]—At all events, the three defendants, who had pleaded bankruptcy, were discharged by the operation of the 49 *Geo. 3*, as the bankruptcy was admitted by the counsel for the plaintiffs. The proceedings, under the commission, were the only evidence produced on the part of the defendants, when one of the bankrupt defendants was offered as a witness; two of these defendants had pleaded *non-assumpsit*

1817.  
EMMETT  
v.  
BRADLEY.

only, which distinguished this case from that of *Raven v. Dunning*, as there both the defendants pleaded the general issue, and one of them also pleaded his discharge under a commission of bankrupt. The other three defendants, in this case, pleaded their bankruptcy; and the only issue taken upon these pleas was, whether the plaintiffs had proved their debt under the commission against them;—That was admitted by the plaintiffs. At this stage of the cause, therefore, a verdict might have been entered in favour of one, or all the defendants, who had proved their act of bankruptcy. Their plea was *probata et allegata*; and there was nothing left to the discretion of the jury. A difficulty was experienced at the trial, whether this being an action of contract against several defendants, the entering a verdict in favour of one of them might not operate as a discharge of the whole. That might have been the case at common law, but as the plea was founded on the statute of the 49 Geo. 3, it operated as a complete discharge *quoad* three of these defendants, and had the same effect as entering a *nolle prosequi*. It cannot be contended that if a *nolle prosequi* had been entered with respect to those three defendants, that they would have been incompetent witnesses. He cited the cases of *Moravia v. Hunter* and *Noke v. Ingham*. They were not interested in the event of the suit, for they were not only discharged from their liability to pay the debt, which is the subject of the action, but were also completely exempt from the payment of costs. As, therefore, the witness offered, stood entirely disinterested with respect to the result of the suit, and was merely introduced on the record, as a nominal defendant, he ought to have been admitted as a witness. The plaintiffs acknowledged that he was a bankrupt, and he could not therefore be considered as an interested witness. It has also been held, in the case

of *Ward v. Haydon* (a), that a defendant in an action of trover, who suffers judgment by default, may be a witness for the co-defendants, as he is not liable for the costs of the issue tried against the others, and is not himself released whatever may be the event of that issue. He cited the cases of *Brown v. Fox* (b), *Brown v. Brown* (c), and *Chapman v. Graves* (d), from which he inferred, that inasmuch as one of the defendants had become bankrupt, and obtained a certificate, and could have no interest in the result of the cause, his evidence ought to have been admitted.

Lord Chief Justice GIBBS.—This case was moved by my brother *Hullock*, on two grounds: the one, that the learned judge had rejected evidence which was offered, and which ought to have been received; the other that he had misdirected the jury, in stating the effect of the deed, dated in *August*, 1810, differently from what it really was. *First*, the witness offered by the defendants, in order to prove that all of them had never entered into a joint contract with the plaintiffs, admitted such contract by his plea, and merely relied on his bankruptcy. The bankrupts stood as defendants on the record, and contended that they had a legal defence;—the plaintiffs went through their proof, and, I am not aware of any case, in which it has been laid down to be the duty of a judge, to give his opinion of the legal effect of particular evidence in the middle of a cause, in order to have an opportunity of introducing other witnesses to be examined for the defendants, and still less so, to admit witnesses to disprove that which they had before admitted to be true. Upon these grounds, therefore, I am of opinion, that such evidence was very properly rejected:—*Secondly*,

1817.  
EMMETT  
v.  
BRADLEY.

(a) 2 *Rep.* 553. S. P. 2 *Camp.* 334, n.—(b) MS. *Exeter Sum. Ass.* 1789. *Phill. Evi.* 3d edit. 63.—(c) 4 *Taunt.* 752.—(d) 2 *Camp.* 333, note.

1817.  
~  
EMMETT  
v.  
BRADLEY.


with respect to the deed, the learned judge left it to the jury to determine, whether there were a dissolution of the partnership before its execution, intimating it at the same time to be his opinion, that such was not the case; I therefore think there is no ground to disturb the direction of the learned judge, with respect to the law, nor the verdict found by the jury, with regard to the facts.

Mr. Justice DALLAS.—It is evident that a partnership once subsisted between all the defendants. It was left as a question for the jury to decide, whether this partnership had been dissolved before the deed of *August*, 1810; and as no evidence was adduced to prove such dissolution before that time, I consider they have rightly determined. With respect to the objection, whether the evidence of the bankrupt defendants was properly rejected or not, I have listened very attentively to the whole of my brother *Hullock's* argument, and have heard no case cited by him which appears to bear upon this point. It is an application of a novel nature, but on the first view of the case, I did not see how it could be supported in principle, for the following reasons:—The general rule is clear, that no person appearing as a party on the record, can be admitted as a witness in the action, unless it seem that such person is acquitted of his liability to the action, and then he may be admitted as a witness for the other defendants. That rule, however, is subject to this qualification: that if there be any evidence given against a defendant, he cannot be admitted as a witness, for the jury are entitled to exercise a discretionary judgment on such evidence; and though the judge may give an opinion before it goes to the jury, still it rests with the latter, and in this case it appears that there was evidence adduced on the part of the defendants, and it was not until after the conclusion of the plaintiff's evidence, that the defendants applied to support their case by the admissibility of one

of the bankrupts as a witness. I have never known this to be allowed, and think the learned judge was perfectly correct in his decision.

Mr. Justice PARK.—I take the principle to be clear, that a plaintiff, or defendant, or any party upon the record, cannot be admitted as a witness in such a case. It was therefore incumbent on my brother *Hullock*, to have shewn a case where, on a question of contract, there are two or more parties entered on the record, and where there is an issue joined, that the defendants may call on the judge to admit one of them to be examined as a witness. In the case of *Chapman v. Graves*, Mr. Justice *Le Blanc* admitted, that a co-trespasser, not sued, was a competent witness for the plaintiff; and, in another case also, tried before Mr. Justice *Le Blanc*, on a joint contract, at *Lancaster*, one defendant was allowed to be a witness for the other; but in that case the defendant, who was admitted as the witness, had pleaded his bankruptcy, and a *nolle prosequi* had been actually entered. Under all the circumstances, therefore, I do not feel myself warranted to differ in opinion from the Lord Chief Justice, and my brother *Dallas*.

Mr. Justice BURROUGH.—I have never heard of an instance, where a defendant on a record in a cause has been permitted to appear as a witness, unless on the conclusion of the plaintiff's case, except where one of the defendants appeared to be acquitted of his liability, but then he is no longer a party on the record. Such is the constant course in actions of trespass; but in this case the defendants were obliged to go into evidence to prove their case on a plea, which in express terms admits a joint cause of action against them all;—yet one of those defendants, it is contended, is to be admitted to prove that no joint cause of action had accrued, but he had with the others, expressly admitted it on the face of the record.

1817.  
  
 ENNETT  
 v.  
 BRADLEY.



1817.  
 ———  
 EMMETT  
 v.  
 BRADLEY.

I am therefore clearly of opinion, that the evidence ought not to have been received.—The case is left precisely in the same situation as it stood in before the defendants were under the necessity of going into proof, after the plaintiff's case was closed, and as they were compelled to do so, I think this witness was properly rejected.

Rule discharged (a).

---

(a) See *Currie v. Child*, 3 Camp. 283. Bull. N. P. 99.

Thursday,  
 June 19th.

HELLINGS v. SHAW.

In an action of *assumpsit*, by an attorney, to recover his charges relative to the grant of an annuity.—Evidence that the defendant said, 'he thought it had been settled when the annuity was granted; but that he had been in so much trouble since, that he could not recollect any thing about it,' is not a sufficient acknowledgment of the debt, to take it out of the statute of limitations, and is not to be left to the jury, as evidence of the admission of such debt; although the plaintiff proved his bill was not paid at the time of granting the annuity.

THIS was an action of *assumpsit* brought by the plaintiff, to recover the sum of £79 : 6s : 2d., for work and labour performed by him, as an attorney, for the defendant, in the year 1809.—The defendant pleaded the general issue, and the statute of limitations. The cause was tried before Mr. Justice *Halroyd*, at the last assizes at *Taunton*, when, on behalf of the plaintiff it was proved, that the business consisted of preparing deeds, for the purpose of procuring an annuity for the defendant, in 1809, who then went abroad. That on his return, in *October*, 1816, the plaintiff called on him with his bill; when the defendant said, 'he thought it had been settled at the time the annuity was granted, that he

had been in so much trouble since, that he could not recollect any thing about it.' It was also proved, by the plaintiff's clerk, who attested the execution of the annuity deed, that the plaintiff's bill was not then settled, as no money had passed between the parties. The learned judge, not considering the evidence sufficient to take the acknowledgment of the debt out of the statute of limitations, directed the jury to find a verdict for the defendant, with leave for the plaintiff to move to set it aside.

Mr. Serjt. *Pell* in the last term obtained a rule *nisi*, that this verdict might be set aside, and a verdict entered for the plaintiff, for the amount of his bill. He relied on the cases of *Bryan v. Horseman* (a), and *Partington v. Butcher* (b).

Mr. Serjt. *Lens* now shewed cause, and submitted, that the opinion of the learned judge was correct, since it was supported by all the previous cases. The decisions, in such cases, have extended as far as reason warrants: If a party admit that a latent debt be unsatisfied, he is bound to pay; because he thereby acknowledges it never has been paid. The defendant, in this case said, 'he considered the debt had been paid long ago.' By this he did not admit that there was a subsisting debt; and he therefore is discharged from the payment, by the length of time which has intervened. The case of *Coltman v. Marsh* (c), was similar to the present; as there, the defendant stated, 'that he did not owe a farthing, for it was more than six years since,' and it was there held, that such statement was not to be left to the jury as evidence of an admission to take the debt out of the statute. In *Bicknell v. Keppel* (d), the defendant referred the plaintiff to his solicitors, by letter; saying, 'that they were in possession

1817.  
HELLINGS  
v.  
SHAW.

---

(a) 4 E. R. 599.—(b) 6 Esp. 66.—(c) 3 Taunt. 380.—  
(d) 1 N. R. 80.

1817.  
 ~~~~~  
 HELLINGS  
 v.  
 SHAW.

of his determination and ability.' The court held, that there was not sufficient in the word 'ability' unexplained, to take the debt out of the statute. The judgment of Lord *Mansfield*, in the case of *Trueman v. Fenton (a)*, was inapplicable to the present; as in that case the defendant said 'prove your debt, and I will pay you; I am ready to account, but nothing is due to you.' He thereby put himself on the balance of account between him and the plaintiff, which he in consequence admitted.—As here, the defendant said, 'he thought the bill had been settled at the time the annuity was granted,' and mentioned nothing to excuse the length of time which had since elapsed, but 'that he had been in so much trouble since, that he could not recollect any thing about it,' is a sufficient reason to shew, that he considered the debt had been discharged. This case, therefore, comes within that of *Coltman v. Marsh*, and the acknowledgment of the debt ought not to be left to the jury.

Mr. Serjeant *Pell*, in support of the rule observed, that the case of *Coltman v. Marsh* was, not only inapplicable to the present, but in direct contradiction to the authorities which had been laid down in other cases.—The principle established by these cases is, that the effect of the statute is only to explain the remedy, without destroying the debt. It has been invariably held, that where a party admits the existence of a debt, the jury may presume whether such debt have been paid or not. It was the intention of the statute to protect those only who had actually paid. The case of *Coltman v. Marsh* was impugned by the subsequent one, of *Leaper v. Tatton (b)*. He referred to the case of *Craig v. Cox (c)*, and a manuscript case therein cited, in which the defendant, upon an application made to him for a debt, wrote for answer,

---

(a) *Cowp.* 548.—(b) 16 *E.* 420.—(c) 1 *Holt*, 380.

that 'he would satisfy the plaintiff, for that he could shew his receipt,' in which case it was held, that the defendant was bound to produce a receipt; and that it was, at all events, a sufficient acknowledgment to go to a jury, upon his failing so to do.—The facts here, are within the meaning of that case, for the defendant said, 'he thought he had settled the bill when the annuity was granted;' but this was negatived. The defendant, by this, admitted that he owed money, but thought it had been paid at a specific time.—If he admitted his liability, and referred to a specific time, when he considered the payment was made, and the plaintiff proved, that at the time the defendant presumed the bill had been paid, no money passed, it should have been left to the jury to infer, whether the money were or were not paid at that time. The case of *Partington v. Butcher*, could not be distinguished from the present, for as the defendant had admitted the existence of a debt, and that he thought it had been settled at the time the annuity was granted, whereas it was proved, by the plaintiff, that such was not the case; it may be very fairly supposed, that the debt has never been discharged. No direct promise is necessary to take the case out of the statute; the rule must be laid down as to what will amount to a sufficient acknowledgment; and, as the case of *Coltman v. Marsh* was in contradiction to the other authorities, he contended that he was entitled to his rule.

Lord Chief Justice GIBBS.—In the first place, I am of opinion, that the evidence adduced by the plaintiff, to prove the acknowledgment of the defendant's debt, was insufficient to take it out of the statute. I agree with my brother *Pell*, that it is difficult to reconcile all the cases which have been determined on this point. It is probable that if the courts could retrace the steps which they have taken, they would perceive that justice would

1817.

HELLINGS  
v.  
SHAW.

1817.  
HELLINGS  
v.  
SHAW.

have been better consulted by a strict adherence to the statute, without consulting the particular cases of individuals. In this case, we have the statute alone to deal with; but the former decisions require consideration. The courts have determined, that when a defendant acknowledged a debt to be due to a plaintiff, the statute did not operate as a discharge; and, further, that a defendant, who admitted the existence of a debt, but claimed his discharge under a written instrument, to which he, with precision referred, but which did not amount to a legal discharge, was bound by such admission, as he thereby precluded all possibility of any other payment, unless what the instrument afforded. So, where a defendant challenged a plaintiff to a certain species of proof, *viz.*, that he would satisfy the plaintiff, as he could produce his receipt, it was held, that he was bound to produce such receipt: It is unnecessary to consider the other cases, as they cannot be easily reconciled. The case of *Partington v. Butcher* is the only one applicable to the present, as the defendant there relied on a certain instrument, which he claimed as a discharge; but he admitted the existence of the debt, if the instrument did not operate as such discharge.—The question is, whether the evidence, adduced in this case, amounts to an admission of the existence of the debt. The defendant considered it a stale demand, and that it had been settled at the time when the annuity was granted; but that he had been in so much trouble since, that he did not recollect any thing about it. His memory, therefore, might be impaired by anxiety, and he did not positively assert, that the money was paid by him at the time of the execution of the annuity deed, so as to furnish a conclusive proof that the debt has not been since discharged; and I therefore think that this case is protected by the statute.

Mr. Justice DALLAS.—The cases applicable to this subject are numerous, and not to be reconciled. They necessarily must be so, because the acknowledgment of the debtor must depend on particular circumstances, if not, they would appear consistent. On taking the abstract principles from all those cases, they leave this as a governing rule. What are the grounds of public justice, on which the statute depends? That actions must be commenced within a given time;—if not, the debtors are discharged. It is the general presumption, that a party may wait six years for the receipt of his money; but where payments are delayed beyond this period, the statute ought to receive a liberal construction. One of its objects was to urge plaintiffs to use due diligence in making demands for payment of their debts; and, on the other hand, to protect defendants from being compelled to produce receipts for sums which they have discharged. The statute, however, does not protect a party against the payment of a just debt. If there be an acknowledgment of such debt, the statute does not apply; but it is necessary that such acknowledgment should be clear and specific. Can it be presumed that the defendant here disclaiming the debt, and stating himself to be impaired in health, from trouble and anxiety, so as to prevent him from the recollection of the precise time when the debt was paid, can be a sufficient acknowledgment to take it out of the statute? It would be going to a greater length than is warranted by any cases which have been previously determined; and I think that the doctrine laid down in these cases should be narrowed, rather than extended.

Mr. Justice PARK.—The defendant has not referred to any particular mode or time of payment; but thought it had been effected when the annuity deed was completed: I therefore think this case comes clearly within the meaning of the statute.

1817.

HELLINGS  
v.  
SHAW.

1817.  
 {  
 HELLINGS  
 v.  
 SHAW.

Mr. Justice BURROUGH.—The defendant referred to the time of the granting the annuity. It might be about that period. By the rule of law, an admission to take a case out of the statute must be all taken together, and the defendant did not perfectly recollect it, but considered the money had been paid. This admission, therefore, cannot amount to a sufficient acknowledgment to take the case out of the statute.

Rule discharged.

Friday,  
 June 20th.

MOORE v. The Earl of PLYMOUTH.

A reservation in a deed of hawking and hunting does not extend to shooting.—

*Quare*, Whether a reservation of this description, either as a grant or personal easement, can be entailed to a man and the heirs of his body.

IN this case, the plaintiff declared in trespass against the defendant, for breaking and entering certain closes of the plaintiff, and for breaking open the gates thereof, and with feet in walking, and with dogs, treading down and spoiling the grass and corn therein growing; and hunting and searching in such closes for hares, pheasants, partridges, and other game; and shooting, killing, and carrying away the same, and converting and disposing thereof to his own use.—The defendant pleaded, *first*, the general issue of not guilty; *secondly*, as to the breaking and entering the closes, and the treading down and spoiling the grass and corn therein growing, and with dogs and guns hunting and searching in such closes for hares, pheasants, partridges, and other game; and shooting, killing, and carrying away the same, and converting and disposing thereof to his own use.—That on the 27th of February, 1655, the Right Hon. Thomas Windsor, Lord Windsor, being entitled to the equity of redemption in the

premises, by the indenture, next thereafter mentioned and conveyed, and *John Langham* and *Stephen Langham* being seized in fee, subject to the said equity of redemption in the said premises, by a certain indenture tripartite made between the right honourable *Thomas Windesor*, Lord *Windesor*, of the first part, *John Langham* and *Stephen Langham* of the second part, and *Thomas Foley* and *Richard Jones*, of the third part,—the said *Thomas Lord Windesor*, and the said *John Langham*, and *Stephen Langham* (by the entreaty and appointment of the said *Thomas Lord Windesor*) for the considerations therein mentioned, granted, bargained, sold, aliened, released, and confirmed unto the said *Thomas Foley* and *Richard Jones* (and to the heirs and assigns of the said *Thomas Foley*, for ever, in their actual possession, &c.); ‘All that park or enclosed ground, called *Bordesley Park*; together with divers other premises, in the said first-mentioned indenture particularly described, and (among others) the said several closes in which, &c.;’—excepted always and reserved out of the said first-mentioned indenture, *free liberty of hawkling and hunting*, in, over, and upon any of the said premises, for the said *Thomas Lord Windesor*, and the heirs of his body, and his and their friends, servants, and followers:—And the defendant further said, ‘that the premises therein-before-mentioned, and in the said first mentioned indenture described, whereof the said several closes in which, &c. in the said first-mentioned indenture also described, were part and parcel as aforesaid, by several meane assignments thereof, afterwards and before the said time, when, &c. came to and vested in one *Henry Geast*, and that he, (*Henry Geast*), before the said time, when, &c. demised the said several places, in which, &c. (among other premises) to the plaintiff, who by virtue of such demise, at the said time, when, &c. was the tenant of the said *Henry Geast*, of the said several places, in which

1817.

MOORE

v.

The Earl of  
PLYMOUTH.



1817.  
 MOORE  
 v.  
 The Earl of  
 PLYMOUTH.

&c.;—and the defendant further said, ‘that he, at the said several times, when, &c. was, and now is, the heir of the body of the said *Thomas Lord Windesor*, and being such heir, he did, in the exercise of such free liberty, so excepted and reserved, out of the said first-mentioned indenture as aforesaid, of hawking and hunting, in, over, and upon the said premises, whereof the said closes, in which, &c. at the said several times, when, &c. were and now are, part and parcel as aforesaid, commit the said several supposed trespasses, as he lawfully might for the cause aforesaid.’—The third plea was similar to the second, omitting the statement of the equity of redemption.—The plaintiff joined issue, on the first plea, of not guilty; and demurred to the second and third, and assigned for cause: that, ‘Whereas the said defendant, by the said second and third pleas hath professed to justify all the trespasses complained of in the declaration, under and by virtue of the said reservation in the said indenture, by the said *Thomas Lord Windesor*, in the said second and third pleas mentioned, viz.—‘The free liberty of hawking and hunting, in, over, and upon the said closes, for the said *Thomas Lord Windesor*, and the heirs of his body, and his and their friends, servants, and followers:’—Yet the said defendant had not, by his said second and third pleas, justified the hunting and searching with the said dogs and guns in the said closes for the said hares, pheasants, partridges, and other game, and then and there shooting the same; nor the killing the said hares, pheasants, partridges, and other game being in and upon the said closes, inasmuch as the said reservation to hunt and hawk, so reserved as aforesaid, did not justify the hunting and searching with dogs and guns for the said hares, pheasants, partridges, and other game; nor the shooting nor killing the said hares, pheasants, partridges, and other game, otherwise than by hunting the same.—The

defendant joined in demurrer.—The questions for the opinion of the court were, Whether the reservation in the deed of 1655, were valid or not; and, secondly, whether the right of hunting and hawking authorised shooting.

1817.  
 MOORE  
 v.  
 The Earl of  
 PLYMOUTH.

Mr. Serjt. *Blosset*, on a former day in this term, in support of the demurrer submitted that the reservation in the deed was void, as, in the *first* place, if it were good to Lord *Windsor* for life, it could not extend beyond that period; and, that *secondly*, it was wholly void, as, at the time such reservation was made, the grantor had the equity of redemption only, and no legal estate in the premises. On the *first* ground, he contended, that this was a mere personal easement or privilege, and could not be reserved to a man and the heirs of his body.—It passed no interest in the land, nor could any profit be derived out of it. It might be assimilated to other easements, as for instance, those of ways, which are granted personally and cannot become transmissible or assignable, unless affixed to land, when they may exist and descend as appurtenant, but not in gross. This principle, as applied to ways, 'may be grounded on a special permission; as, when an owner of land grants to another a liberty of passing over his grounds to go to church, to market, or the like: In which case the gift or grant is particular and confined to the grantee alone;—it dies with the person, and if the grantee leave the country, he cannot assign his right to another, nor can he even justify taking another person in his company' (a). The question then is, how far this reservation, being considered as a personal grant, to shoot and hunt over the lands of another, could be granted to a man and the heirs of his body. This cannot be considered as an entailable gift or grant (b). It may be contended that if this be not an entailable in-

---

(a) 9 *Black. Comm.* 35.—(b) *Co. Litt.* sect. 13, page 20, a. 6.

1817.  
 MOORE  
 v.  
 The Earl of  
 PLYMOUTH.

terest, it may still be a fee conditional, as before the statute *de donis* (a), and a grantee by his grant or release, might bar his heir, as he might have done at common law. The condition, therefore, being fulfilled by *Thomas Lord Windsor's* having had heirs of his body, he might alien and transfer his right. Then, however, this insurmountable obstacle arises against the defendant, viz: that he could not derive his interest in this manner, because it is not of a transferable or descendable nature, unless annexed to land. It is not assignable, for 'a licence to hunt can extend only to him to whom it is given, and cannot be granted over; for licence is but pleasure, which cannot be granted over any more than an easement of way over my land, and the same law of licence to come into my house, and eat and drink, cannot be granted over' (b). Game can only be considered in the nature of personal property.—Can this reservation, therefore, amount to an easement, or property in land for a man and his heirs? A licence to hunt, is merely for pleasure. There is no authority which extends to the grant of an easement to a man and the heirs of his body. If it be admitted, that this is not an assignable, nor properly entailable interest, but that it is still descendable with the estate, and must continue to *Thomas Lord Windsor*, and the heirs of his body, still it is void by the statute of *quæ emptores* (c), and becomes an inalienable service, charged on the land. He referred to the case of *Bradshaw v. Lawson* (d), where it was held, 'that if a lord of a manor convey a customary estate to the tenant, he cannot reserve to himself the ancient services; for the tenant by reason of the statute, must then hold of the superior lord.' No distinction can be drawn in a case where an old service is created, or where there is a new service by in-

(a) 13 *Edw.* 1. c. 1.—(b) *Brooke's Abr. Lic.* 65, pl. 10.—  
 (c) 18 *Edw.* 1. stat. 1.—(d) 4 *T. R.* 443.

denture. This case, therefore, comes within the principles laid down in *Bradshaw v. Lawson*, and the reservation cannot be parted with, but must remain as a species of feudal relation. *Secondly*, the reservation is wholly void, on account of its uncertainty and generality. He referred to the case of *Fitch v. Rawling* (a), where it was held, that a custom for all persons for the time being (being in a parish) to play at cricket was bad, since it might extend to all the persons in *England*.—The reservation in question is co-extensive with that custom, since it is not confined to the particular friends of Lord *Windsor*, but includes his heirs, and his and their friends; as a reservation it is further void, as Lord *Windsor*, at the time of the grant, possessed no legal interest in the property. He referred to *Shepherd's Touchstone* (b), to shew that a reservation must be made to the grantor, and not to a stranger to the deed. It is not an exception, because it is not a part of the thing granted, neither can it be construed in the nature of a grant. It is therefore clear that it can be good only as a reservation, and a reservation must be made to the grantor. The law will take no notice of an equitable interest. He cited the case of *Cbetham v. Williamson* (c), as being precisely in point, and relied on the judgment there given by Mr. Justice *Lawrence*.—This reservation cannot be considered as a grant, for it is in the nature of a bargain and sale, which cannot pass an easement. The case of *Cbetham v. Williamson* was more than a mere personal privilege, and no question was there made as to whom it would descend. In Lord *Mountjoy's* case (d), a liberty to enter and dig was held to be an interest in the land. *Thirdly*, he contended, that if the reservation were valid, still a liberty to hawk and hunt did not ex-

1817.  
MOORE  
v.  
The Earl of  
PLYMOUTH.

• (a) 2 H. B. 393.—(b) Page 80.—(c) 4 E. R. 469.—  
(d) *Godb.* 17.

1817.  
 MOORE  
 v.  
 The Earl of  
 PLYMOUTH.


tend to shooting. It must be confined to hunting and hawking in the ordinary acceptation of the words, and could not enable a person to enter on lands with guns for the purpose of shooting game. A licence must be pursued strictly (a)—So, in *Manwood's Forest Laws* (b), a licence to hunt must be pursued within the very manor, and cannot be extended.—The use of guns were known long before the deed of 1655. To support this assertion he referred to the statutes of the 33 *Hen.* 8, c. 6, and the 3d of *Edw.* 6, c. 14 (c). It is probable that a liberty might be reserved to hawk and hunt, but not to shoot; as by the latter means the game is more easily destroyed. If it were intended that this reservation conveyed the privilege of shooting, why were the words hunting and hawking only introduced?—for neither of these terms can extend to shooting.

Mr. Serjt. *Lens*, *contra*, said that he should first consider the special ground of demurrer.—He premised that hunting, in its general acceptation, was the most enlarged term for sporting that could be used; as it extended to any pursuit of game.—It was the intention, by the reservation in the deed, to grant an indulgence to Lord *Windsor* his heirs and their friends to enter the lands for the purpose of sporting; and although it could not transfer an interest in the soil, still, if it were sufficient to secure those who entered from committing trespass, it would be good. If this reservation be within the principles laid down in the case of *Cbetham v. Williamson* it would be insufficient, but it is not here necessary to go so far, as an interest in the soil was not required. The statute 11 *Hen.* 7, c. 17, is applicable, to shew that hunting extended to the taking of pheasants or partridges in nets, and that shooting was

---

(a) *Owen* 73, *Vin. Abr. Licence C.*—(b) 188.—(c) Repealed by 6 & 7 *W.* 3, c. 13. §. 3.

not then in use, and extended to protect game in manors, and to give the licence of sporting to the lords, their friends and servants, in hunting, hawking, and taking of pheasants and partridges.—The question is, whether this is a void reservation, or whether it may be considered as a transmissible interest? An interest in the soil is not necessary, and, therefore, it is not expedient to extend this case so far as a grant. If this be a mere personal licence, it cannot be extended, but must be restricted to Lord *Windsor*, for life. But this interest may be entailed by the statute *de donis*. If it relate to tenements, it is a fee simple conditional. The grantor is not obliged to alienate, nor is it transmissible on other grounds, but remains with the grantor and his heirs as long as the licence continues. The issue of Lord *Windsor*, therefore, being still in existence, the licence enures to them. With respect to a right of way to a man and his heirs, it may be difficult as to its existence, but still such right may be inheritable. An annuity cannot be entailed, because it is merely personal; still, however, it may be aliened, or sold. It cannot be assumed that a grant must expire with the person to whom it is granted. He referred to *Co. Litt. (a)*, to shew that this reservation came within the statute *de donis*. The grantor had a right to exercise this privilege within these lands, and although he had no right to game, as a personal chattel, still he had a right to enter the lands in pursuit of it. It has been held *(b)*, that although a grant of a thing which does not concern lands or tenements, and is not exercisable in lands or tenements, cannot be entailed within the statute *de donis*; yet it was resolved, that a name of dignity might be entailed within that statute *(c)*. So, in *Manxell's case (d)*, it was held that the office of steward, receiver, or bailiff of a

1817.  
  
 MOORE  
 v.  
 The Earl of  
 PLYMOUTH.

(a) 20, a.—(b) 1 *Roll. Abr.* 837, pl. 50.—(c) *Nevil's case*.  
 7 *Coke*, 33, b.—(d) *Plowden's Comm.* 2 & 3.

1817.  
 MOORE  
 v.  
 The Earl of  
 PLYMOUTH.

manor, might be entailed within the statute, because it is exercisable within lands. There cannot be a more remote connection from land, than a nomination of title. A right to fowl is not unconnected with soil, for a prescription for all the tenants of a manor to fowl in a warren is good: it is a profit appendre, in *alieno solo* (a). This reservation, therefore, amounts to more than an easement. [Lord Chief Justice Gibbs.—The lord may prescribe for his tenants. In the case of copyholds he must prescribe for himself and his copyholders also. In the case of a freehold, he must prescribe for himself and for all whose estate he hath.] In *Davies's* case the tenants might prescribe for themselves, for being a right to enter on a warren it was a profit appendre, and the tenants might maintain their right. So, if one give a licence to me and my heirs, to hunt in his park, I have a right to have it by writing, for that which passes by licence is for a perpetuity (b).—This reservation not being restricted to Lord *Windsor* individually, is sufficient to protect him and his heirs, &c. from being liable to an action of trespass for following game in the lands of another, although no interest passed in such lands by the reservation. It has been contended, that this was a service, and, therefore, contrary to the statute of *quia emptores*, but it is not so, for there is no holding to create such service; neither is there a new holding, for it is merely a reservation of a personal privilege; neither does it create any new service with reference to any feodal relation. It has been said, that this reservation is void, on account of uncertainty, for which purpose the case of *Fitch v. Rawling* has been cited, which is wholly inapplicable, for, in this case the friends of Lord *Windsor* must accompany him, as a stranger would not be justified in entering the lands; even

(a) *Davies's* case, 3 *Mod. Rep.* 246.—(b) *Year Book*, 11 *Hen.* 7, fo. 8.

if it were bad for friends, it would be good for the heirs of Lord *Windsor*. This reservation however extends even to the servants of Lord *Windsor*, for 'if a man has a licence for him and his servants to hunt at his pleasure, he may also kill and carry away, for the licence for the servant imports an interest in the thing' (a). If, therefore, this reservation can be considered entailable, the defendant would have a sufficient interest in the land, and in *Pleowden* even a remote interest was held to be sufficient. This reservation may further be entailed, under the statute *de donis*. It may be extended to the heirs of Lord *Windsor*, as they have a fee simple conditional. This is not purely a personal interest, as the exception was no part of the old estate, nor a reservation of the old right; and the defendant is therefore entitled to judgment.

Mr. Serjt. *Blisset*, in reply, submitted, that this was neither a grant nor an exception, but merely a reservation out of the original deed. It has been contended, that the receivership of a manor, as an office of profit, was entailable; but that was a privilege to enter lands for a particular purpose. It has also been insisted, that this reservation was not void for uncertainty, but there is a distinction in the case of *Fitch v. Rawling*, as a custom for all the inhabitants of a parish to play at games and sports was good; but that a similar custom for all the persons within a parish was bad. So, here the friends of Lord *Windsor* were uncertain. If, therefore, this reservation be bad for his friends, it must be equally so for himself and his heirs, for the reservation is entire, and cannot be good, as to one part, and bad as to the other. With respect to the case of *Bradshaw v. Lawton*, the estate was not held by the grantor, because there was, first a feoffment of services followed by a covenant to pay old services, as new, and the action was brought for

1817,  
Moore  
&  
The Earl of  
Plymouth.

---

(a) *Com. Dig.* tit. *Chace*, H. 1.



1817.

MOORE

v.

The Earl of  
PLYMOUTH.

such services, and not for the profits. There was consequently no pretence to say that there was a forfeiture by such service. As to the licence for a man and his servants, cited from *Com. Dig.*, it refers to the earlier authorities, which establish that warrens, chaces, and parks, are incorporeal hereditaments, and give the owners an interest in game, and make it a specie of property; but it cannot extend to this case, which is neither a grant nor an easement. In *Davies's* case, the owner of the warren had a property in the game, as well as an interest in the land. The case cited from the *Year Books* for a licence within a park falls under the same principle, for both these places are privileged. An easement cannot be entailable, within the statute *de donis*, if no profit be attached to it. The property in game is confined solely to privileged places, and cannot extend to land generally. Dignities belong to land, because they derive their name only from it; but it does not follow that although they may be remote from the land, that all other easements may be entailed. So, an annuity may be limited to a man and his heirs, because a profit is derived from it; but an easement, without interest or profit, cannot be entailed on a man and his heirs. This reservation, therefore, can neither be transmissible, assignable, or descendible, but is merely a service between the grantor and grantee, and is therefore void. Even if by its operation, and in its construction, it could be considered valid, still the term hunting must receive the common acceptation, and cannot extend to the pursuit and destruction of game by shooting;—and although the art of shooting was not known at the time this deed was made, still hunting could not apply to taking game, by a species of destruction then unknown.

*Cur. ado. vult.*

Lord Chief Justice GIBBS, on this day, delivered the

following judgment of the court.—This was an action of trespass brought by the plaintiff against the defendant, for breaking and entering his closes and pursuing every species of sporting therein. These acts the defendant endeavoured to justify.—Here his Lordship recapitulated the pleadings, as stated in the former part of this case. To the defendant's pleas several objections have been taken by the plaintiff. *First*, that the reservation is void, as it is not made by the persons from whom the estate moves. To this the defendant answered, that although the deed might not amount to a reservation of the whole, still that being under the seal of all the parties, it might operate as a grant, or that at all events, it was more than a mere easement, because it was a reservation to Lord *Windsor* himself, his heirs, and their friends, servants, and followers. The case has been well argued;—the court have fully considered the whole of it, and referred to all the authorities which have been cited, but the point which seems to be most worthy consideration is this. Supposing the indulgence to have full operation, whether as a reservation or a grant, the defendant was justified in shooting on the premises in question. Under the indenture of 1655, there was an exception and reservation for hunting and hawking only. The term hunting cannot be extended to shooting, and hawking applies only to the destruction of feathered game. If a person give a licence to another to hunt over his lands, it is clear that such privilege cannot extend to shooting. If a person give another leave to hunt, it would be a great annoyance if such leave extended to shooting. We are therefore of opinion that the true construction of hunting cannot extend to shooting, and that the other objections which have been raised need not be touched on, and that consequently there must be

1817.  
 MOORE  
 v.  
 The Earl of  
 PLYMOUTH.

Judgment for the plaintiff.

Friday,  
June 26.

THOMSON v. BROWN.

An obligation by deed, cannot be altered but by deed; therefore, in an action of covenant on a charter-party, in which the plaintiff covenanted to sail from *London* to *Gibraltar*, and there to deliver an outward cargo, and receive from the agents of the defendant (as freighter) at *Gibraltar*, or at *Malaga*, *Cadiz*, or *Seville*, as should be ordered by the agents at *Gibraltar*, such goods as the agents might load on board for the homeward cargo, and that the vessel should return direct to the port of *London*, and deliver the homeward cargo, the agents of the defendant at *Gibraltar*, having ordered the plaintiff to proceed to *Cadiz*, at which place other agents directed by parol that the homeward cargo should be delivered at *Liverpool* instead of *London*.—*Held*, that the plaintiff having delivered the cargo at *Liverpool*, and declared in an action of covenant on the charter-party, could not recover the freight, the substitution by parol of *Liverpool* for *London* being inconsistent with the covenant contained in the charter-party.

The plaintiff declared in covenant upon a charter-party of affreightment, made the 24th of *October*, 1815, between himself, as master of the brig *Fortitude*, then in the port of *London*, and the defendant, as freighter, whereby the plaintiff covenanted that the vessel being tight, &c. he would receive on board, in the port of *London*, all such lawful goods as the defendant might think fit to load, not exceeding what she could reasonably carry, and having received the same on board, and being dispatched therewith, the vessel should immediately set sail and proceed direct to *Gibraltar*, where being arrived and ready to deliver the cargo, the plaintiff should give immediate notice thereof in writing to the agents of the defendant there, and make a true delivery of the whole of the cargo agreeably to bills of lading which should be signed for the same, and having completed the delivery of the outward cargo, and being again ready to load, the plaintiff should receive and take on board the said vessel from the agents of the freighter at *Gibraltar* aforesaid, or at *Malaga*, or *Cadiz*, or *Seville*, as should be ordered by the said agents at *Gibraltar*, all such other lawful goods as the said agents might think fit to load, not exceeding as aforesaid; and having received the homeward cargo on board, and being dispatched therewith, should immediately set sail and return direct to the port of *London*, where being arrived and ready to deliver the homeward cargo, the plaintiff should give immediate notice thereof in writing to

the freighter or his agents, and there make a true delivery of the whole of the homeward cargo agreeably to bills of lading which should be signed for the same; and that on such delivery being completed, the intended voyage should end. And the plaintiff agreed, that the vessel should lay in the port of *London* for the purpose of receiving the outward cargo on board, and at *Gibraltar* for delivering the same, and there or at *Malaga, Cadiz, or Seville*, for the purpose of receiving the homeward cargo on board, and in the port of *London* for delivering the same, 60 running days, &c. In consideration of which, the defendant as freighter, covenanted with the plaintiff at his own costs, to send the outward cargo alongside the vessel in the port of *London*, and receive the same from alongside her at *Gibraltar*, and give the order relative to the vessel's port for loading the homeward cargo; and at *Gibraltar, or at Malaga, Cadiz, or Seville*, at his own costs, send the homeward cargo alongside the vessel, and receive the same from alongside of her in the port of *London* within the days limited for those purposes, and also would pay to the plaintiff, for the freight of the vessel for the voyage both out and home, £550 sterling, together with £5 per cent. primage thereon, and also a gratuity to the plaintiff of £200 5s. as follows: £200 part thereof, to be paid in cash forthwith on the day the vessel should be cleared outward at the custom-house in the port of *London*; £100 further part thereof, to be paid in cash forthwith, on a right and true delivery of the outward cargo at *Gibraltar* at the then current rate of exchange; one equal moiety of the remainder of the freight, &c. to be paid in cash forthwith on a true delivery of the homeward cargo in the port of *London*, and the residue thereof by a bill or bills drawn on, and accepted by, the defendant and his partner, payable in *London* at two months after date from the day on which the delivery should be completed. The plaintiff

1817.  
 THOMSON  
 v.  
 BROWN:

1817.  
THOMSON  
v.  
BROWN.

further agreed, that it should be lawful for the defendant and his agents, to keep the vessel on demurrage at the ports or places of loading and unloading for ten running days beyond the time before limited, on paying the plaintiff five guineas a day. The declaration then stated, that the plaintiff received on board from the defendant, in the port of *London*, all such lawful goods as the defendant thought fit to load, not exceeding what the vessel could reasonably carry; and that on the 29th of *Nov.* 1815, she set sail, and proceeded with her outward cargo direct to *Gibraltar*, where she arrived on the 25th of *January*, 1816, and being ready to deliver her cargo there, the plaintiff gave immediate notice thereof in writing, to the agents of the defendant, and made a true delivery of the whole of the cargo agreeably to the bills of lading which were signed for the same; and that on the 13th of *February* following, completed the delivery of the outward cargo, and that having so done, and the vessel being again ready to load, the plaintiff was then ready to receive and take on board the vessel, from the agents of the defendant at *Gibraltar* aforesaid, or at *Malaga*, *Cadiz*, or *Seville*, as should be ordered by such agents at *Gibraltar*, all such other lawful goods as the agents might think fit to load, not exceeding as aforesaid. That the plaintiff was, on the 16th of *February*, directed by the agents of the defendant at *Gibraltar*, in that behalf duly authorised and empowered, to proceed from thence to *Cadiz*, for the purpose of there receiving and taking on board an homeward cargo, and that in obedience to such direction, he set sail on that day for *Cadiz*, at which place he arrived on the 17th of *February*, and immediately gave notice of his arrival there to the agents of the defendant, and was there ready to have received on board from such agents, all such other lawful goods as the agents might think fit to load, not exceeding as afore-

said; and that the plaintiff remained at *Cadiz* in such readiness until the 25th of *February*, but that the agents of the defendant at *Cadiz* did not think fit to put on board the vessel there any goods whatever; but after his arrival at *Cadiz*, and after he had continued there with the vessel in such readiness, on the 23d of *February*, he was directed by the agents of the defendant at *Cadiz* to proceed with the vessel without delay to *Seville*, or as near thereto as was customary for vessels of the same burthen, and there to receive from the agents of the defendant, a full and complete cargo of lawful goods as might be tendered to him by such agents, with the proviso stipulated in the charter-party, and to do with the same in the manner provided for by the charter-party, with the exception that the port of delivery of the cargo, should be *Liverpool* and not *London*.—The plaintiff then averred, that in pursuance of the directions so received by him from the agents of the defendant at *Cadiz*, he, on the 25th of *February* set sail from thence for *Seville*, where he arrived on the 2nd of *March*, and gave immediate notice thereof to the agents of the defendant, and there took on board, from such agents, all such other lawful goods as they thought fit to load, and were tendered to him, not exceeding as aforesaid; and that the vessel having received the homeward cargo on board, set sail from *Seville* on the 26th of *March*, and returned therewith direct to *Liverpool*, being the port appointed and substituted for the port of *London*, as the port of delivery for the homeward cargo; that he arrived with the cargo on board the vessel at *Liverpool* on the 2nd of *May*, and was there ready to deliver the same, and that the plaintiff gave immediate notice of his arrival at *Liverpool*, and of his readiness to deliver the homeward cargo to the agents of the defendant there, and made a true delivery of the whole of such homeward cargo agreeably

1817.  
THOMSON  
v.  
BROWN.

1817—  
 THOMSON  
 v.  
 BROWN.

to bills of lading that were signed for the same; and that the homeward cargo was there received by the agents of the defendant, and such delivery completed on the 14th of May, and so the voyage was ended according to the form and effect of the charter-party.—The plaintiff then averred, that he would have returned direct to, and made a true delivery of the homeward cargo in the port of *London*, if he had not been directed by the agents of the defendant at *Cadiz*, to proceed therewith to *Liverpool*, and if *Liverpool* had not been substituted by such agents, as the port of delivery of the cargo instead of *London*. The plaintiff then assigned for breach, that the defendant had not paid him for the freight of the vessel for the voyage both out and home, according to the terms of the charter-party, but that the whole of such freight still remained due and unpaid. And the plaintiff further averred, that the vessel was kept on demurrage by the defendant, at the ports and places of loading and unloading for the space of sixteen running days over and above the lay days as mentioned in the charter-party, and that he ought to have paid to the plaintiff £84, being at the rate of £5. 5s. per day for each of the sixteen running days during which the vessel was kept on demurrage, but which the defendant had not paid. To this declaration the defendant, after craving *oyer* of the charter-party, demurred generally, and the plaintiff joined in demurrer.

Mr. Serjt. *Best* on a former day in this term, in support of the demurrer, submitted that the only discretion to be exercised by the defendant's agents abroad was vested in those at *Gibraltar*, who might order the vessel to be loaded either there or at *Malaga*, *Cadiz*, or *Seville*; but that even these agents were not authorised to substitute the port of *Liverpool* for that of *London*, on the homeward voyage. The plaintiff in the charter-party has covenanted to return

with the homeward cargo to *London*; but as *Liverpool* has been substituted for that port, according to the directions of the defendant's agents at *Cadiz*, such covenant has not been performed by him. If a party undertake to perform a specific thing, on the completion of which he would be entitled to a remuneration, he must aver either that he has done the thing stipulated for, or used his utmost endeavours to do so; or that he has been prevented by the defendant from accomplishing it. At all events, the plaintiff should have stated in the declaration, that he offered to go to *London*, but that the defendant would not consent to his so doing; whereas, he has merely averred, that he was directed by the agents of the defendant at *Cadiz*, to proceed to *Liverpool* instead of *London*. In *Worsley v. Wood*, in error (a), Lord *Kenyon* says, 'if there be a condition precedent to do an impossible thing, the obligation becomes single: but however improbable the thing may be, it must be complied with, or the right which was to attach on its being performed, does not vest. If the condition be that A. shall enfeoff B., and A. do all in his power to perform the condition, and B. will not receive livery of seisin, yet from the time of Lord *Coke* to the present moment, it has not been doubted, but that the right which was to depend on the performance of that condition, did not arise.' In that case the party had gone further than in the present, as he did all in his power to perform the condition. In *Glazebrook v. Woodrow* (b), where the plaintiff covenanted to sell to the defendant a house, and to convey the same to him, and in consideration thereof the defendant covenanted to pay the plaintiff a certain sum of money, it was held, that the covenant to convey, and that for the payment of the money, were dependent cove-

1817.  
 THOMSON  
 v.  
 BROWN.

---

(a) 6 T. R. 719.—(b) 8 T. R. 366.



1817.  
 ~~~~~  
 THOMSON  
 v.  
 BROWN.

nants, and that the plaintiff could not maintain an action for the money, without averring that he had conveyed or tendered a conveyance to the defendant. He also referred to the case of *Kingston v. Preston* (a). This principle has been established by former decisions. In *Lancashire v. Kellingworth* (b), it was laid down by Lord Chief Justice Holt, 'that where the plaintiff himself is to do 'an act to entitle himself to an action, he must either 'shew the act done, or if it be not done, at least that he 'has performed every thing that was in his power to do.' Had the plaintiff been prevented from going to *London* by the act of the defendant, this case would then fall within the principle of *Lancashire v. Kellingworth*. This is in fact a new bargain, and may be the subject of another action. He referred to the judgment of Lord *Ellenborough*, in *Smith v. Wilson* (c), as containing stronger terms in favour of the defendant, than the present case required. So in *Cook v. Jennings* (d), which was an action on a charter-party of affreightment, in which the defendant covenanted to pay so much for freight, for goods delivered at *A*. The delivery of goods at *A*. being considered as a condition precedent, it was held, that freight could not be recovered *pro rata itineris*, if the ship were wrecked at *B*. before her arrival at *A*., though the defendant accepted his goods at *B*.; and the judgment of Mr. Justice *Lawrence* (e) in that case, is an express decision to shew, that the substitution of one port for another, might have been evidence of a new contract between the parties, and it is therefore clear, that the plaintiff cannot maintain an action of covenant on the original charter-party, under which the defendant only engaged to pay freight, in the

---

(a) 8 T. R. 371, cited at large in *Jones v. Barclay*, 2 Doug. 689.

—(b) Com. Rep. 117.—(c) 8 E. R. 439.—(d) 7 T. R. 381.

—(e) *Id.* 385.

event of the vessel's delivering her cargo in the port of *London*, and which event did not take place.

Mr. Serjt. *Vaughan*, for the plaintiff, stated, that as he was in justice entitled to freight, the only question to be considered was, whether there were a legal objection to its recovery in this action. A sufficient reason has been alleged on the face of the declaration, to discharge the plaintiff from his original contract. With respect to the *dictum* of Lord *Kenyon*, cited from the case of *Worsley v. Wood* in error, his lordship has more distinctly stated in the subsequent case of *Cook v. Jennings*, that 'if *A.* covenant to enfeoff *B.*, *A.* is not released from his covenant, though *B.* will not accept livery of seisin, unless the act be frustrated by the act of the covenantee.' That creates the distinction. Although this be in the nature of a condition precedent, and the voyage must precede payment of freight, yet, if the plaintiff perform the voyage according to the charter-party, or can shew that it has been discharged or dispensed with, by order or desire of the defendant, it will be sufficient for him to maintain his action. This case may be also distinguished from that of *Smith v. Wilson*; for Lord *Ellenborough* there states, that if the plaintiff had done all that he had offered to do, and which the defendant discharged him from performing, still it would have amounted at most, only to an endeavour on his part, to prosecute and complete the voyage, and to procure, as far as in him lay, the arrival and discharge of the vessel at her destined port; but in that case no part of the voyage was performed. That case, therefore, has no relation to the present. In *Cook v. Jennings*, Mr. Justice *Lawrence* held, that a master of a vessel was not entitled to the whole freight, unless he performed the whole voyage, except in cases where the owner of the goods prevented him; nor was he entitled *pro rata*, unless under a new agreement. If therefore the

1817.

THOMSON  
v.  
BROWN.

1817.  
 THOMSON  
 v.  
 BROWN.

plaintiff were prevented, either by the act of the defendant or by the default of his agents, he would be entitled to freight. This cannot be a new voyage, for the plaintiff stopped short at *Liverpool*, where the cargo was accepted by the defendant. The case of *Hotham v. The East India Company (a)*, could admit of no distinction from the present, where it was held, if one covenant with another to do a certain act in consideration of a reward, and the other prevent the stipulated thing from being literally performed, and accept of an equivalent, he may be sued for the reward, and the reason of the non-compliance with the literal terms may be averred in the declaration. He also referred to the case of *Shepard v. De Bernales (b)*, to shew that the plaintiff had done sufficient to entitle him to his freight. The delivery of the cargo at *Liverpool*, was for the benefit of the defendant only, and his having accepted it, agreeably to the bills of lading, was a sufficient compliance with the directions of the agents.—As the plaintiff, therefore, stopped short at *Liverpool*, this could not be considered as a new or second voyage, and the reason for his so doing, being stated on the record, will operate as a sufficient excuse for his not having performed the voyage according to the strict terms of the charter-party.

Mr. Serjt. *Best*, in reply, observed, that although the goods had been accepted at *Liverpool*, the plaintiffs could not recover on the charter-party, as the defendant's agents at *Cadiz* had no power to alter the port of delivery from *London* to *Liverpool*;—neither did it appear in any part of the declaration, that the agents at *Cadiz* were authorised so to do. [Lord Chief Justice *Gibbs*.—The only agents referred to in the charter-party, are at *Gibraltar*, who may direct the vessel to be loaded, either there or at

---

(a) 1 *Doug.* 272.—(b) 13 *B. R.* 565.

*Malaga, Cadiz, or Seville.* One point has not been satisfactorily explained.—It appears, by the declaration, that the agents of the defendant, at *Cadiz*, directed the vessel to go to *Seville*. What authority had they for so doing? The only authority, by which the ship could proceed in her voyage, was vested in the agents at *Gibraltar*. The substitution of *Liverpool* for *London*, has given a totally different complexion to this case; and, therefore, the plaintiff, in point of law, cannot be entitled to sue on the original charter-party, for even the agents at *Gibraltar* could not contravene the terms of it, or bind the defendant by their acts. The agents at *Gibraltar* were merely authorised, if the vessel were not loaded there, to send her to one of three ports. The authority of those agents ceased, on their determination to send her to *Cadiz*.—Third persons, at *Cadiz*, not only send on the vessel to *Seville*, but even alter the port of delivery, from *London* to *Liverpool*. The plaintiff has averred, that he has performed the voyage. That, however, must mean, according to the terms of the charter-party, which have not been complied with. According to the judgment of Lord *Kenyon*, in the case of *Cook v. Jennings*, it must appear by a positive allegation, that the plaintiff was prevented from delivering the cargo at *London*, by the immediate act of the defendant. The cases of *Smith v. Wilson*, and *Hotham v. The East India Company*, cannot assist the plaintiff. As in the one, the party was ready to go the voyage, but was prevented, and in the other, the vessel being stranded at *Margate*, and the goods damaged, the owners took them out of the vessel there in that state, and brought them to *London*, which amounted to a performance of the voyage. Wherever there is a substitution of one place for another, in the middle of a voyage, such substitution creates a new bargain. In *Shepard v. De Bernales*, the places at which the

1817.  
 THOMSON  
 v.  
 BROWN.

1817.  
 THOMSON  
 v.  
 BROWN.

vessel was to touch, were named in the charter-party; but here, *Liverpool* was not mentioned.—Part of the freight was to be paid by bills in *London*, at two months from the day of completing the delivery. Unless, therefore, the cargo were delivered in *London*, the plaintiff could not be entitled to those bills. This, therefore, being in the nature of a new bargain, cannot be engrafted on the charter-party, and the present action of covenant, cannot, consequently be maintained; for there has been a substitution of one place for another, by parol, to which none of the covenants in the charter-party applied. He referred to the judgment given by Mr. Justice *Lawrence* in the case of *Heard v. Wadham* (a). At all events, the agents of the defendant abroad, could not extend the limits of their authority, and divert the course of the voyage; and the defendant is therefore entitled to judgment.

*Cur. adv. vult.*

Lord Chief Justice GIBBS, on this day, delivered the following judgment of the court.—This was an action of covenant, on a charter-party of affreightment. [Here his Lordship recited the terms of the charter-party, and the facts as stated in the declaration.] He then proceeded to state, that the only question was, whether the plaintiff, having by the direction of the defendant's agents abroad, proceeded to *Liverpool*, instead of *London*, under a parol agreement, and delivered the cargo at the former place, could be entitled to full freight and demurrage as if such delivery had been duly made at *London*. The objection to his being entitled to recover in this action is founded on a maxim of law, viz. That an obligation by deed cannot be disputed, but by deed. The acts to be performed by

---

(a) 1 E. R. 630.

the plaintiff and defendant, are concurrent. On the delivery of the cargo at *London*, the plaintiff would have been entitled to freight and demurrage, but the fact is, that the delivery was not made at *London*. It has been contended, on behalf of the plaintiff, that the port of *Liverpool* might be substituted for that of *London*, without deed; but this is a substitution by parol. The ground on which the plaintiff relies, is only supported by the *dicta* of Lord *Mansfield* and Mr. Justice *Buller*, in the case of *Hosbam v. The East India Company* (a). In that case, the question did not arise on a charter-party on the delivery of goods, as here; for the vessel was there wrecked at *Margate*, where the goods, being damaged, were taken out of her by persons employed by the defendants, and afterwards sent to *London*, and on such delivery, the same freight was paid, as if the goods had been delivered in *London*, according to the terms of the charter-party. An action of covenant was at first brought on the charter-party, to which the defendants pleaded, but afterwards both parties consented to entangle the questions in dispute between them in four different feigned issues. Notwithstanding this, Lord *Mansfield* and Mr. Justice *Buller* went out of the points submitted to them in their judgment, and stated the law applicable to the charter-party; although on the issues the legal right of the parties was the same. Both these judges there stated that, had the action been brought on the charter-party, it was open to the plaintiff to have alleged that it had been agreed between him and the freighters, that the delivery should take place at *Margate* instead of *London*, and that the same freight might have been recovered, although the one port had been substituted for the other. Both these judges have expressly laid down this as law. It is singular

1817.  
 THOMSON  
 v.  
 BROWN.

---

(a) 1 *Doug.* 272.

1817.  
  
 THOMSON  
 v.  
 BROWN.

that this doctrine has never been acted upon in any subsequent case, although there are several in which it might have been properly introduced, neither is there any case in which it has been confirmed. The courts, therefore, might have considered these decisions as mere *dicta*, as the question did not necessarily arise on the face of that case, but still no judgment has since been pronounced in cases to which this point might be subjected, where these *dicta* have been alluded to. Although the greatest respect may be due to such authorities, still, if there have been no cases or authorities precedent or subsequent to fortify them, they must be somewhat lessened. But there are previous, as well as subsequent cases, which controvert the doctrine there laid down. In *Blemerbasset v. Pierson* (a), which was an action of debt on a bond, conditioned for the payment of several sums of money at several days, and the defendant pleaded payment of all sums due before a certain day, at which day the plaintiff by writing agreed to defer the payment of the residue; it was held, that the action being founded on a deed, no defeasance could be made thereof afterwards without deed; and that a writing under hand did not imply a deed. The charter-party, in this case, was by deed, in which the plaintiff covenanted to unload the cargo at the port of *London*; therefore, the parol substitution of *Liverpool* for that port, cannot control the effect of that deed. The case of *Hotbam v. The East India Company*, was never argued, and there have been many subsequent decisions to establish the principle laid down in the case of *Blemerbasset v. Pierson*. In *Little v. Holland* (b), the case of *Brown v. Goodman* is cited in a note, where, in an arbitration bond the time was limited for the arbitrator to make his award, and the declaration stated, that such

---

(a) 3 Lev. 234.—(b) 3 T. R. 592.

time was afterwards enlarged by mutual consent, it was held that no action could be maintained on the bond to recover the penalty for not performing the award made after the time first limited. That case cannot be distinguished from the present.—The agents of the defendant, at *Cadiz*, were not empowered to alter the stipulation in the charter-party. In the case of *Leslie v. De la Torre*, cited in *White v. Parkin* (a), where a ship was chartered to wait for convoy at *Portsmouth*, Lord *Kenyon* would not suffer a parol agreement to be set up on the other side, to substitute *Corunna* for *Portsmouth*, on the ground that the agreement by charter-party, being under seal, the plaintiff could not set up a parol agreement inconsistent with it, and which, in effect, was intended to a certain extent to alter it. Here, the plaintiff covenanted by deed, to deliver the homeward cargo at *London*, but by a private stipulation entered into by certain persons at *Cadiz*, *Liverpool* was substituted as the port of delivery.—As in the case of *Leslie v. De la Torre*, the defendant was not entitled to demurrage under a parol agreement; so the freight, in this case, which was payable according to the terms of a prior deed, could not be recovered under a parol agreement. The case of *Coat v. Jennings* establishes this: that if a defendant covenant to pay freight for goods delivered at *A*, such freight cannot be recovered *pro rata itineris* before the arrival of the vessel at *A*.—Although that case is not particularly applicable to this question, still it establishes the principle, that a parol cannot vary a prior written agreement. The case of *Heard v. Wadham* (b) is in point, and Mr. Justice *Lawrence* there said, that ‘all the cases ‘cited where a substitution of one thing for another was ‘admitted, were, where subsequent to the breach of

1817.  
 THOMSON  
 v.  
 BROWN.

---

(a) 13 E. R. 583.—(b) 1 E. R. 619.



1817.  
THOMSON  
v.  
BROWN.

'covenant, the covenantee had agreed to accept another thing in satisfaction of his damages, which was an answer to an action for the non-performance of the thing stipulated.' To this doctrine I wholly accede:—If two parties covenant that a certain thing shall be performed, and one of those parties accept a thing substituted in lieu thereof, and afterwards bring an action on the original covenant, the answer to the action is that the plaintiff by accepting the substitution, has received a full satisfaction and compensation for the damages to which he would otherwise have been entitled, on the original covenant. It is an established rule, that where one party seeks compensation from another, it is incumbent on him to shew, that he had done all in his power to entitle himself to such compensation, and that nothing has been substituted in the stead thereof. Having therefore fully considered the effect of all the decisions, in cases applicable to this question, as well previous as subsequent to that of *Hotham v. The East India Company*, and being of opinion that the maxim of law, that an obligation by deed cannot be disputed, but by deed, we think that this, coupled with the authorities of the cases referred to, are more weighty than the decisions of Lord *Mansfield* and Mr. Justice *Buller*, in the case of *Hotham v. The East India Company*, and that consequently there must be

Judgment for the defendant (a).

---

(a) See 2 *Wms. Saunders*, n. 3. 352, a.

SOARES and another, v. THORNTON.

Friday,  
June 20th.

THIS was an action of *assumpsit*, on a policy of insurance upon flax, valued at £5200, at and from *Pernau* to *Oporto*.—The declaration contained three counts on the policy, in all of which the interest was stated to be in the plaintiffs. The loss on the first count was averred to be by barratry of the master, in the second by certain perils, losses, and misfortunes, which came to the hurt, detriment, and damage of the goods; and in the third by perils of the seas. The defendant pleaded the general issue of *non assumpsit*.—At the trial before Mr. Justice *Burrough* at the sittings at *Guildhall*, after the last *Hilary* term; the jury found a verdict for the plaintiffs for £500 damages, subject to the opinion of this court, on a case, of which the following is the substance:—The plaintiffs are merchants in *London*, and on the 20th of *February*, 1816, entered into a charter-party as freighters with *Joze de Fontes*, commander of the *Portuguese* brig, called the *Joze* and *Maria*, then lying in the port of *London*, whereby the commander covenanted with one of the plaintiffs, on behalf of his house of trade (as freighter,) that the brig being tight, staunch, &c. the said commander, or some other proper person in his stead, should receive on board in the port of *London* from the freighter seventy tons of flax, and five tons of hemp, and proceed therewith direct to the port of *Figueira*, at which place being arrived, and ready to deliver the cargo, the commander should give immediate

If the owner of a vessel, fully laden by the freighters, collude with the captain to run her on shore:—*Held*, that this amounts to barratry, although by the terms of a charter-party entered into between such owner and the freighters, the former was entitled to put goods on board during a previous part of the voyage.

1817.

SOARES

v.

THORNTON.

notice to the agents of the freighter, and deliver the whole of the flax and hemp, agreeably to bills of lading. That having completed such delivery, the brig should, with all possible dispatch, set sail and proceed direct to the port of *Pernau* in *Russia*, where, being arrived, and ready to load, the commander should give immediate notice to the agents or assigns of the freighter, and receive on board from them, an hundred tons of flax, and having received the same on board, together with other goods thereafter mentioned, and being dispatched therewith, should set sail and proceed direct to *Oporto*, where, being arrived, and ready to deliver the cargo, the commander should give immediate notice to the agents of the freighter, and make a right and true delivery of the one hundred tons of flax, agreeably to bills of lading, and that on such delivery being completed the said voyage should end.—And the commander agreed, that the brig should lay at *Pernau*, twenty running days in the whole, for receiving the one hundred tons of flax, such lay days to commence on the tenth day of *April* then next ensuing, if the brig should have arrived on that day at *Pernau*, or if not, from the day on which she should arrive there. The commander further agreed, that the vessel should go addressed to the agents of the freighter, at the ports of delivery and discharge; in consideration whereof, the freighter covenanted to send on board, the seventy tons of flax, and five tons of hemp, along side the brig in the port of *London*, and the one hundred tons of flax at *Pernau*, within the lay days allowed, or days of demurrage thereafter granted, and to receive and take the one hundred tons of flax from along side the brig at *Oporto*, with all possible dispatch; and pay unto the commander for the freight or hire of the brig for the voyage from *London* to *Figuira*,

at the rate of £2 10s. per ton, for every ton of flax or hemp which should be delivered from the brig at *Figueira* with £5 per cent. primage, in lieu of all port and pilotage charges, and also that he would pay to the commander for freight, of the one hundred tons of flax from *Pernau* to *Oporto*, at the rate of £6 sterling per ton, together with £5 per cent. primage thereon, and in lieu of all port and pilotage charges;—and that the whole of the freight and primage from *London* to *Figueira*, and from *Pernau* to *Oporto*, should be paid as follows: viz. £300. part thereof to be advanced to the commander, previous to his sailing from the port of *London*: but the commander agreed, that in the event of the loss of the brig, during the voyage, the said sum of £300 should be returned to the freighter, and the remainder of the freight and primage paid in cash forthwith, on the freighter's receiving advice of a right and true delivery of the flax, at *Oporto*. And the freighter agreed, that the commander should have liberty, without prejudice to the charter-party, to receive any goods on freight on board the brig at *Figueira* and convey the same to *Pernau*, and there deliver them; and that for the purpose of loading such goods, he should be allowed fourteen running days in the whole, from the day of the brig's arrival at *Figueira*, he agreeing that the delivery should take place at *Pernau* within eight running days after her arrival at that place; and the freighter also agreed, that the commander should be at liberty, without prejudice to the charter-party, to complete the loading of the brig at *Pernau*, with any other goods on freight, over and above the one hundred tons of flax, and in such case the commander agreed that the agents of the freighter, at *Pernau*, should have the preference of shipping the other goods on their paying the commander freight for such goods in proportion to the rates of freight therein-before stipulated to be paid for the one hundred tons of

1817.  
 SOARES  
 v.  
 THORNTON.

1817.  
 SOARES  
 v.  
 THORNTON.

flax. And the commander agreed, that the brig should not be detained at *Pernau* any longer time above the lay days allowed for loading the one hundred tons of flax than should be necessary for stowing the remainder of the cargo.—The commander further agreed, that it should be lawful for the freighter to keep the vessel on demurrage at *Pernau*, fifteen running days beyond the lay days, on paying him £3 per day; for the performance of which covenants, each of the parties bound himself in the penalty of £700: and it was further agreed by a memorandum entered into between the parties, previously to the execution of the charter-party, that the freighter should send the one hundred tons of flax along side the brig at *Pernau*, and that the expence thereof should be paid either by him, or the commander, agreeably to the custom of that port:—And also, that the commander should send the one hundred tons of flax to the quay at *Oporto*, at his own expence.

*Fontes*, described in the charter-party, as the commander, was in fact also the sole owner of the *Jeze and Maria*. The plaintiffs, pursuant to the charter-party, shipped in *London* the seventy tons of flax, and the five tons of hemp, and in the beginning of *March*, the vessel proceeded to sea with that cargo, under the command of one *Gouvea*, (*Fontes* remaining in *England*,) and on the 26th of *March* arrived at *Figueira*, whence, after discharging her cargo, she proceeded in ballast to *Pernau*, where she received on board, on account of the plaintiffs, 634 bales of flax, which filled her. After loading this cargo, the vessel sailed for *Oporto*, and in the course of her voyage put into *Deal*, in order to repair a leak occasioned by bad weather. Whilst the brig lay at *Deal*, *Fontes*, the owner, came on board her, when he proceeded to sea, took the management of the vessel, and directed her course, and on the 10th of *October*, wilfully ran her on

shore; *Gouvea*, the captain, being privy, and concurring thereto;—the brig was lost; the cargo was landed on the coast of *France*, one half of which was greatly damaged by sea-water. The plaintiffs, on receiving advice of the arrival of the brig at *Pernau*, effected the policy in question, which the defendant subscribed for £500. On the 26th of *October*, the plaintiffs received notice of the loss, and on the same day, gave notice of abandonment to the defendant. The question for the opinion of this court was, whether the plaintiffs were entitled to recover. If the court should be of opinion that they were, then the verdict was to stand, but if not, it was to be set aside, and a non-suit entered.

Mr. Serjt. *Best* for the plaintiffs, submitted that they were entitled to recover on two grounds: *first*, that the vessel was destroyed by the barratry of the master, and *secondly*, under the general words of the policy, of ‘all other losses, perils and misfortunes, that have, or shall come to the hurt, detriment, or damage of the said goods, and merchandizes, and brig, &c., or any part thereof.’ *First*, although the person who acted as master was also the sole owner of the brig, antecedent to the voyage, still the plaintiffs were the owners of her during such voyage. This, therefore, is a species of barratry for which the plaintiffs are entitled to recover. Generally, if to the character of a master of a vessel, that of owner be united, no action can be maintained for barratry: because no one can recover for a loss, which has been occasioned by his own act. In the infancy of commerce, the same person was ship-owner, merchant, owner of goods, and frequently the captain. When the modes of carrying on commerce divided, and interests were different, it became requisite that the rules of law should be enlarged. An owner of goods might maintain an action for barratry, as being the temporary owner of the

1817.

SOARES

v.

THORNTON.

1817.  
SOARES  
v.  
THORNTON.

ship. The case of *Vallejo v. Wheeler* (a) is undistinguishable from the present, and was not touched on by the subsequent decision, in *Nutt v. Bourdieu* (b). The plaintiffs, in this case, were the persons insured. If they have an interest in the goods, and fraud be committed, they may recover as owners, *pro hac vice*. A person who puts goods on board a general ship may recover in an action for barratry. Here the plaintiffs had the direction of the voyage from the commencement to its termination. The brig was to sail, and be detained at the different ports as long as they thought proper. They were therefore the owners for this voyage. The brig was moreover dispatched by the plaintiffs as freighters. This, therefore, was not like a general ship, for there the time of sailing was regulated by the captain;—this was a hiring of the vessel for the voyage. The commander was to receive the goods of the plaintiffs on board; a power which none but the actual owners could exercise. On the arrival of the brig at *Pernau*, the commander could not complete the loading without the permission of the plaintiffs' agents. If, therefore, they were not the owners of the brig, he might have done this without their consent or sanction, and although the commander might take in goods by the permission of the plaintiffs' agents, still he could not detain the brig at *Pernau*, beyond the time limited in the charter-party for her loading. By the very spirit and terms of the clauses in the charter-party, therefore, the direction and management of the brig were vested in the plaintiffs only. The commander had merely to obey their directions, and although the brig might carry other goods, still, as the commander could not load, without the approbation of the plaintiffs, it must be inferred, that the

---

(a) *Cowp.* 143.—(b) 1 T. R. 322.

interest of the vessel was, in effect, wholly parted with to them. [Mr. Justice *Park*.—Is it usual for charter-parties to be framed without the words, ‘letting to freight?’] This was substantially a letting to freight, for the plaintiffs had the privilege of filling the vessel. By the effect of the charter-party, the whole of the vessel was placed in the hands of the charterers for the voyage. The defendant in justice ought to satisfy this loss, as the plaintiffs were not privy to it. *Secondly*, if the plaintiffs could not recover for barratry, still the defendant would be liable as underwriter, under the general words in the policy, ‘of all other perils, losses, misfortunes, &c.’ as these words imply a complete security to the assured against all dangers, which might arise, during the course of the voyage. He referred to the case of *Cullen v. Butler*, which was decided in the court of *King’s Bench*, in *Michaelmas* term, 1816 (a), to shew, that a vessel sunk in consequence of being fired at by another vessel through mistake, might be considered as included under these general words in the policy.

Mr. Serjt. *Vaughan*, for the defendant, insisted that the plaintiffs had no ground to entitle them to recover, in this action, except on the barratry of the master.—In the case of *Earle v. Rowcroft* (b), the term barratry has been defined to be a breach of duty, by the master, in respect to his owners, with a fraudulent or criminal intent, and done *ex maleficio*, whereby a loss accrues to them. It is therefore evident, that an act committed by or with the consent of an owner, cannot be barratry: but it has been contended, that the freighter of the brig is the owner *pro hac vice* on this voyage, and that this case is within the doctrine laid down in *Vallejo v. Wheeler*.—

1817.

SOAKES  
v.

THORNTON.

---

(a) This case has not yet been reported.—(b) 8 E. R. 126.



1817.  
 SOARES  
 v.  
 THORNTON.

That case is better reported in *Lofft (a)*, where Lord *Mansfield* says, 'a good deal depends on the nature of the agreement by the charter-party, whether it be an agreement between the owners and freighters, that the ship shall go to a particular place, or whether it be a letting of the ship to the freighters; but it is material when a ship is let to freight, whether the owners of the goods have not the direction. If she be let as a house to the freighter, then the freighter is the owner; but on the other hand, if it be only a covenant between them that the ship shall go that voyage for the freighter, then he has only the use of the vessel for his goods, but not the direction of her.' Although a freighter may be owner, *pro hac vice*, does the charter-party, in this case, make him so? There is no covenant to shew that the ship was wholly let to the plaintiffs. The commander, who entered into the charter-party, was the owner, and had not parted with his interest as such, by any of the covenants in the charter-party. The rights of the parties must depend on the construction of these covenants; from neither of which can it be inferred, that the brig, in this case, was let to freight, or that the plaintiffs had the sole management of her during the whole of the voyage. In the case of *Frazer v. Marsh (b)*, it was held that the registered owner of a ship having chartered her to the then captain, at a rent for a certain number of voyages, was not liable for stores furnished to the ship by order of the charterer, during the charter-party, and Lord *Ellenborough* there held, 'that to say that the registered owner, who divests himself by the charter-party of all control and possession of the vessel for the time being in favour of another, who has all the use and benefit of it, is still liable for stores furnished to the vessel by the order of

---

(a) 631.—(b) 13 E. R. 238.

'the captain during the time, would be pushing the effect of the register acts much too far.' The case of *Nutt v. Bordieu* must govern the present, as barratry can only be committed against the owner of a vessel and without his consent, and a man may have the use of a ship without the possession or direction of her; and in order to entitle the plaintiffs to recover *pro hac vice*, it was necessary for them to have the possession of the brig for the exclusive purpose of this voyage. In this charter-party, the words let to freight are omitted, which is unusual. In the case of *Hutton v. Bragg (a)*, there was an express letting to freight, and, as in this case, the plaintiffs were not the owners of the vessel for the whole of the voyage, as they had no interest therein between *Figueira* and *Pernau*, on account of their having then no goods on board; the right of ownership, during that time, was vested in the commander. This, therefore, was not in effect a letting of the brig for the whole of the voyage, and the defendant is therefore entitled to judgment.

Mr. Serjt. *Best* in reply, observed, that it was unnecessary to define the term barratry, as it had been so fully explained in the case of *Earle v. Rowcroft*. The only question to be considered is, whether this case falls within the principle laid down in *Vallejo v. Wheeler*, which ought rather to be extended than narrowed. The plaintiffs in this case, having fully laden the brig at *Pernau*, were in the complete and exclusive possession of her, at the time the loss happened. They covenanted to pay freight during the whole of the voyage, on which terms the brig was hired. The words contained in the charter-party cannot merely be acted upon; but it is necessary to look to the whole intention of the parties, with reference to the subject matter, and it is fully apparent

1817.  
SOARES,  
J.  
THORNTON,

---

(a) 2 Marsh. 339.

1817.  
 SOARES  
 v.  
 THORNTON.

from the terms of that instrument, that the charterer should have the exclusive use and possession of the vessel during the whole of the voyage, and therefore the plaintiffs must have been the indefeasible owners at the time of the loss. They were in as complete possession as charterers could be; and as the vessel was fully laden by them, at the time of the loss, the goods were co-extensive with the vessel, the whole of which was let to them. He cited the judgment of Lord *Ellenborough* in the case of the *Master of the Trinity House v. Clarke* (a), and insisted that the vessel in this case was in the possession of the plaintiffs, for every useful purpose, and that therefore, they must at least be considered to be owners, *pro hac vice*. The case of *Nutt v. Bordieu* was distinguishable, as here the plaintiffs might conduct the voyage at their discretion, and this was not a mere letting of goods, as the owner had parted with the whole of his interest in the brig to the plaintiffs, to whom not only the time of sailing and the course of the voyage was left, but also the times which the vessel was to wait at her loading ports. As the plaintiffs, therefore, were so empowered by the terms of the charter-party, and as this case must be governed by that of *Vallejo v. Wheeler*, they were clearly entitled to recover.

*Cur. adv. vult.*

On this day, Lord Chief Justice GIBBS delivered the judgment of the court as follows:—This was an action of *assumpsit* on a policy of insurance. It is unnecessary to state the declaration at large. The first count states, that certain goods, in which the plaintiffs were interested, were shipped on board the *Jane* and *Maria*, for a certain voyage therein mentioned, and avers a loss by *baratry*.

---

(a) 4 M. and S. 298.

The plaintiffs must confine their cause of action to that count only, as they can recover on no other ground but barratry. His Lordship, after stating the terms of the charter-party, and the facts as mentioned in the special case, observed, that the only material question to be considered, was, whether the plaintiffs were entitled to recover for a loss by barratry. The objections which have been raised to such a recovery, are that *Fontes* the owner being on board the vessel, and having originally acceded to the act of running her on shore, it could not assume the character of barratry. It will be necessary to consider to what extent the interference of the owner may be carried, so as to prevent that act. Barratry is a fraud which is not committed against an owner who seeks to recover the value of goods lost from the underwriters, but a fraudulent or criminal act committed by the captain or mariners against the owner of a ship. The owner of goods may be innocent of collusion between the captain and owners of a ship; still, if the ship-owner collude with the captain, no criminality can attach to the owner of the goods. Barratry, therefore, being an act of fraud against the owner of a ship, if he agree with the captain to the commission of that act, it cannot be barratry as against him, for his own concurrence thereto precludes it. Pursuing this principle, the Court of *King's Bench* in the case of *Fallejo v. Wheeler*, which was an action brought on a policy to recover a loss from the underwriters for barratry, where *Willes*, the owner of the vessel, acceded to the act, it was insisted that it could not be a fraud on him. To this it was answered, that although *Willes* was the original owner of the ship, still having let her to *Darwin* to freight, and he being the freighter when the act was committed, he must be considered as the owner, *pro hac vice*. If *Darwin*, therefore, had colluded with the captain, it would not amount to barratry; but the con-

1817.

SOARES

v.

THORNTON.

1817.  
  
 SOARES  
 v.  
 THORNTON.

currence of *Willes* was of no effect, because *Darwin* being the freighter of the ship, and the goods which were on board being his, he stood in the situation of owner by being such freighter. That principle is undisputed, and applicable to all the cases where an owner of a ship has freighted her to another. This case differs materially from those which have been decided, as in the latter the owner had no right to do any thing on board. Here the owner covenants only to receive on board a certain quantity of goods in *London*, and to proceed with them direct to *Figueira*. There is no provision in the charter-party to receive goods during the voyage from *Figueira* to *Pernau*, neither is there any stipulation for freight, during that part of the voyage. It is further provided by the charter-party, that it shall be lawful for the owner, without prejudice to the charter-party, to put goods on board at *Figueira* himself, and take them to *Pernau*. This looks like an admission from the owner, that the brig was fully let to freight to the plaintiffs, and that it was necessary for him to reserve this right by an express proviso in the charter-party; although the freighters only covenanted to put a certain quantity of goods on board, still the owner must content himself with the freight of such goods. It seems, by the language of the charter-party, that from *Pernau* to *Oporto*, the freighters were only to supply certain quantities of goods, and that the owner might complete the loading of the brig there, but that the agents of the freighters should have the preference of filling the vessel. It has been contended, that although in the case of *Vallejo v. Wheeler*, the freighter of the goods might be considered as owner, still, that in this case, as the original owner had an interest in the freight in part of the voyage, the freighters could not be considered as owners. Have not the ship-owner and freighter in this case changed places

The owner has not reserved an original control over the ship, but only a power to do certain acts. It is necessary to look to the ulterior part of the voyage. If at the time the barratry were committed, the owner had no control over the vessel, but she was fully loaded by the freighters, then the concurrence of the owner, with the master, to commit the act, could have no effect. The parties stood in this situation. The owner of the ship had, at one time, a right to interfere in loading part of the brig with goods; but there was only one period of the voyage in which he could exercise such right. He might freight the vessel from *Figueira* to *Pernau*: but he did not do so. At *Pernau*, the plaintiffs alone, as freighters, completely loaded the vessel. The owner's right to interfere, therefore, was completely at an end. Such being the case, the freighters had the exclusive control of the vessel from that period. Although the loss happened by the connivance of the captain and the original owner of the brig, such loss would amount to barratry, as it was committed without the concurrence of the freighters who had a full cargo on board. The rights of the original owner were at an end, and at the time of the loss, the freighters rights were in existence. Their concurrence was absolutely requisite to authorise the conduct of the parties. The case of *Vallejo v. Wheeler* is distinguishable in terms, though not in principle. This, therefore, is a loss by barratry, and not prevented from being so, by the concurrence of the original owner. The justice of the case is advanced by considering it in this light. It is extremely hard, that the owner of goods should be responsible for a loss occasioned by an act in which he did not concur, and by which he was alone the sufferer.

Judgment for the plaintiffs. . .

1817.  
SOARES  
v.  
THORNTON.

Friday,  
June 20th.

POPE v. TILLMAN and another.

In a declaration in replevin for taking goods, the description, number, and value of them must be stated with certainty.

THIS was an action of replevin. The declaration stated, that the defendants on the 1st of *March*, 1816, in the parish of *Pillaton*, in the county of *Cornwall*, in a certain dwelling-house there, took divers goods and chattels of the plaintiff, of the value of £50, and unjustly detained the same, until, &c. The defendants suffered judgment by default. A writ of inquiry was executed, when the plaintiff recovered damages to the amount of £50, as stated in the declaration.

Mr. Serjt. *Lens*, in the course of the last term, had obtained a rule *nisi*, that the entry of final judgment on the verdict found for the plaintiff on the execution of the writ of inquiry should be set aside, and that the same should be stayed, on the ground that neither the description or number of the goods were specified in the declaration. He cited the case of *Wyatt v. Essington*, (a) where it was held, that in a declaration of trespass for taking *diversa bona et catalla*, such description was too general, and the judgment was arrested, for the uncertainty of the declaration what the goods were, so that this recovery could not be pleaded in bar of another action brought for the same goods. So in *Bertie v. Pickering*, (b) it was held, that in an action of trespass for taking goods, the declaration must specify the particulars. So in *Player's* case (c), which was an action of trespass, *quare clausum fregit et pisces suos cepit*, was adjudged ill, and judgment arrested after verdict; and although it was argued that the verdict had made the declaration good, still it was held that although the writ was general, the declaration ought to have been particular, and that the omission of

---

(a) 2 *Ld. Raym.* 1410. *S. C.* 1 *Stran.* 637.—(b) 4 *Barr.* 2455.—(c) 5 *Coke* 34, b.

the nature and number of the fish was matter of substance, and not of form.

Mr. Serjt. *Best* on this day shewed cause, and observed, that in the cases of *Wyatt v. Essington* and *Bertie v. Pickering*, the statute of 4 *Ann* c. 16. was not noticed by the court. These too were cases of trespass, and it is more material to particularize the goods in such cases, than in replevin. If there had been a special demurrer, the objection might be good, but it cannot be so in arrest of judgment. He referred to the stat. 4 *Ann* c. 16. s. 1 and 2. (a) The enumeration of the goods is not a matter of substance, but merely of form, for the goods themselves are the substance, and therefore no advantage can be taken by general demurrer, or in arrest of judgment. In the case of *Bowdell v. Parsons* (b), where a request to the defendant to do an act is necessary to be alleged, in order to give the plaintiff his cause of action, and it is

1817.

POPE

v.

TILLMAN.

(a) By which it is enacted, 'that no advantage or exception shall be taken, of or for an immaterial traverse, the default of entering pledges upon any bill or declaration, the default of alleging a *proferit in curia* of any bond, bill, indenture, or other deed, mentioned in the declaration or other pleading, or of letters testamentary, or letters of administration, the omission of *vi et armis* or *contra pacem*, the want of averment of *hoc paratus est verificare* or *hoc paratus est verificare per recordum*, or not of alleging *prout patet per recordum*; but the court shall give judgment according to the very right of the cause, without regarding any such imperfections, omissions, or defects, or any other matter of like nature, except the same shall be specially and particularly set down, and shewn for cause of demurrer, notwithstanding the same might have heretofore been taken to be matter of substance, and not aided by the stat. of Queen *Elizabeth*, so as sufficient matter appear in the pleadings upon which the court may give judgment, according to the very right of the cause.' The second section extends to judgments entered upon confession, *nihil dicit* or *non sum informatus* in any court of record; and it is thereby enacted, that 'no such judgment shall be reversed, nor any judgment upon any writ of inquiry of damages executed thereon be stayed or reversed, for or by reason of any imperfection, omission, defect, matter or thing whatsoever, which would have been aided and cured by any of the statutes of *Jeofails*, in case a verdict of twelve men had been given in the said action or suit, so as there be an original writ or bill, and warrants of attorney duly filed according to law.'

(b) 10 *E. R.* 369.



1817.  
 POPE  
 v.  
 TILLMAN.

alleged, but without a particular venue (there being a general venue laid in the preceding part of the declaration) such omission cannot be taken advantage of in arrest of judgment, since the stat. 4 Ann c. 16. s. 1. being mere matter of form, is available only upon special demurrer, and this, though judgment passed by default on which a writ of inquiry was executed. The plaintiff in this case has stated, that the defendants entered his house and took his goods. This therefore is sufficient, and as the enumeration of them is mere matter of form, it is aided by the statute.

Mr. Serjt. *Lens* in support of the rule, after stating that the declaration in replevin should contain the same description of the goods as in trespass, and that the only question was, whether sufficient appeared upon the face of this declaration, was stopped by the court.

Lord Chief Justice GIBBS. The subsequent process of *de retorno habendo* and *capias in wilbernam*, depend entirely on the value, number, and description of the goods taken. The declaration, therefore, should be more accurate in replevin, than in trespass. The court rely on two cases, decided *tempore Hardwick*. The one, *Kempster v. Nelson* (a), where a declaration for taking *bona et catalla nra viz. quandam parcell' linte' et quandam parcell' papyri ipsius querentis*, was held sufficient; and in the subsequent case of *Bourne v. Mattaire* (b), for taking fourteen skimmers and ladles, and three pots and covers, the declaration was held sufficient. In both these cases the nature of the property was stated, so as to guide those persons from whom it was taken; but in this case no property has been specifically stated, and the rule, therefore, must be made Absolute (c).

(a) 4 Bac. Abr. 387.—(b) Rep. *Tempore Hardwick*. 1st. 2 Strange, 1015. S. C.—(c) Sec 2 Wms. Saund. 74. b. Gen. Dig. Pleader, 3. k. 10.

## WOOD and another v. DAY.

Saturday,  
June 21st.

**T**HIS was an action of covenant, brought by the plaintiffs to recover a compensation from the defendant, for not repairing certain premises according to covenants contained in an indenture of lease, of 1754. It was stated in the declaration, that long before the making the indenture of lease thereafter mentioned, *Thomas Knackstone* the elder, was seised in fee, of certain premises thereafter demised, in the county of *Kent*, subject to the law and custom of *gavelkind*, and that being so seized, he died intestate on the 1st of *January*, 1725, leaving *Frances*, his widow, and two sons, *Thomas* and *Francis*. That on his death, one undivided moiety of the premises descended to his two sons, in equal undivided moieties, and the other moiety vested in his widow. That the two sons were seized in fee of their moiety, and the widow also became seized of the other moiety of the premises thereafter demised for her life, the reversion thereof, after her death or intermarriage, belonging to the two sons, their heirs and assigns, in equal moieties as tenants in common. That *Francis*, the son, died intestate on the 1st of *January*, 1754, leaving *Frances*, his only child, to whom his undivided moiety descended. That *Frances*, the widow, on the 1st of *January*, 1754, intermarried with *Frederick Hill*, whereby her moiety of the premises became forfeited, and was vested in the said *Thomas*, and *Frances*, the daughter of the said *Francis Knackstone*, whereby the said *Thomas*, and *Frances* the

A lessee by executing a lease, is estopped from disputing the title of either of the lessors:—

Therefore, in an action of covenant for not repairing, against the assignee of the original lessee, where such assignee was bound to the performance of the same covenants as those contained in the original lease.—

*Held*, that a declaration which stated that the plaintiffs derived their title from two lessors only, and that two other lessors who were also parties to the demise had no interest therein, was supported by the production of the lease, which appeared to be a demise by the four.—If a lessee covenant to leave premises in repair at the expiration of the term, and also that the lessors might

direct the lessee to complete the repair, by giving six months notice in writing.—*Held*, that these are two distinct and separate covenants, the former of which is not qualified by the latter.

1817.  
~  
WOOD  
v.  
DAY.

daughter, became seized in fee of the whole of the premises thereafter demised in undivided moieties, who suffered *Frederick Hill*, and *Frances*, his wife, to remain in possession of the moiety, which had been vested in *Frances*, the widow, until her decease, although she had no legal title. That the said *Thomas* and *Frances Knackstone*, being so seized as aforesaid, and *Frederick Hill*, and *Frances*, his wife, being in possession of the said moiety by the sufferance and permission of *Thomas* and *Frances Knackstone*, but having no legal right, title, or interest thereto or therein, by an indenture, dated the 18th of *March*, 1754, and made between the said *Frederick Hill*, and *Frances*, his wife, and *Thomas* and *Frances Knackstone* of the one part, and one *Hans Sloane* of the other part, the said *Frederick Hill*, and *Frances* his wife, and *Thomas* and *Frances Knackstone*, demised the premises in question to *Sloane*, for the term of 61 years, at a rent therein mentioned. That *Sloane* covenanted with the said *Frederick Hill*, and *Frances* his wife, and with *Thomas* and *Frances Knackstone*, severally and not jointly, that before the end of two years of the said term, he would, at his own costs and charges, take down a messuage then standing upon the ground thereby demised, and at his like costs and charges would, in the room thereof, erect and build a good and substantial brick and timber messuage. And the said *Sloane* further covenanted, that he would, at his like costs and charges, well and sufficiently repair, amend, maintain, uphold, support, fence, glaze, pave, cleanse, and keep the said messuage so to be erected and built, and all other erections upon the said ground thereby demised, and all the pales, fences, &c. to the said premises then belonging, or that should at any time thereafter, during the said term of 61 years, be erected or built upon the said premises thereby demised, or any

part thereof when occasion should require, and at the expiration of the said term, should leave and yield up the peaceable and quiet possession of the said messuage and premises, so sufficiently repaired as aforesaid, unto the said *Frederick Hill*, and *Frances* his wife, or their assigns, if the said *Frances* should be then living, but if she should be dead, then unto the said *Thomas* and *Frances Knackstone*, their heirs and assigns. The declaration then stated the entry of *Hans Sloane* as lessee, the reversion as to one moiety of the premises belonging to *Thomas*, and the other to *Frances*, the daughter of *Francis Knackstone*. The plaintiffs then averred, that although *Frederick Hill*, and *Frances* his wife, were parties to the lease, still they had neither of them any legal right, title, or interest in the premises, the right and title of *Frances Hill* having been, by the law and custom of gavelkind, forfeited by her intermarriage with *Frederick Hill*. They then averred, that *Frances Hill* died on the 1st day of *January*, 1761, and that *Thomas Knackstone*, on the 8th of *June* in the same year, devised his moiety of the premises to his wife *Frances*, in fee, and died in 1762. That his widow, on the 17th of *May*, 1792, devised her moiety to *Frances Knackstone*, one of the lessors, by her then name of *Frances Hill*, she having intermarried with *Edward Hill* and died in 1793. That upon her death, *Edward Hill*, and *Frances*, his wife, were seized in right of the said *Frances* of the reversion. That in 1808, by an indenture of bargain and sale, the said *Edward Hill*, and *Frances*, his wife, sold the reversion of the premises to one *Thomas Prior*, to the use of the plaintiffs to whom a regular title was deduced. The plaintiffs averred, that on the 3rd of *January*, 1808, all the estate, right, title, and interest of *Hans Sloane*, to the residue of the said term of 61 years, and which expired on the 29th of *September*, 1815, vested in the defendant by assignment.

1817.  
WOOD  
v.  
DAY.

1817.  
 {  
 Wood  
 v.  
 Day.

—The breach assigned was, that on the 10th of *August*, 1810, and on divers other days, between that day and the day of the demise, a certain messuage, stable, and divers buildings, which had been erected on the said demised ground, had become ruinous, dilapidated, and in great decay, for want of needful and necessary repairs, and that the defendant, at the expiration of the term, left them in a ruinous and dilapidated condition, contrary to the covenants contained in the indenture of lease, granted to *Hans Sloane*, on behalf of himself and his assigns to be performed.

The defendant pleaded, *first, non est factum, secondly*, that *Frederick Hill* and *Frances* his wife had no legal right, title, and interest in the premises demised; and in ten subsequent pleas traversed all the material facts alleged in the declaration. On all which pleas issue was joined.

On the trial of the cause before Mr. Justice *Dallas*, at the last assizes at *Maidstone*, on the production of the indenture of lease, by the plaintiffs, it appeared that the parties were therein described, as stated in the declaration, and no evidence was adduced to shew that *Frederick Hill* and *Frances* his wife had no legal title or interest to the premises in question at the time of the demise. The counsel for the defendant insisted that the indenture proved the reverse, as they were parties to it, and that the rent was therein reserved to the said *Frederick Hill* and *Frances* his wife;—to the use of the latter for her life. The covenants were likewise entered into with them, and it having been averred in the declaration that they had no legal interest in the premises at the time of the demise, but that the plaintiff's title was derived from *Thomas* and *Frances Knackstone* only, or that if *Frederick Hill* and *Frances* his wife had no legal interest in the premises, the demise was, in law, the demise of *Thomas* and *Frances Knackstone* only,

and should have been so stated in the declaration, according to the legal operation of the demise.

It further appeared, that the covenants to repair contained in the lease, were in the following terms, *viz.* "And also that *Hans Sloane* should well and sufficiently repair the said premises, so to be erected and built by him, and all other erections, &c. upon the piece of ground thereby demised, when occasion should require, and the same so being well and sufficiently repaired, should at the end of the term yield up and surrender unto the said *Frederick Hill* and *Frances* his wife, if she should be then living, but if she should be then dead, to the said *Thomas* and *Frances Knackstone* : And also that it should be lawful for the said *Frederick Hill* and *Frances* his wife, during her estate and interest in the premises, and also for the said *Thomas* and *Frances Knackstone*, their heirs, &c. twice, or oftener, in every year, to enter and come into the said demised premises to view the state and condition thereof, and of all such defaults, defects and wants of reparations, that should be found, give or leave notice in writing at the said demised premises unto the said *Hans Sloane*, to repair and amend the same within six months, then next following, within which time *Sloane* covenanted with the said *Frederick Hill* and *Frances* his wife, and with the said *Thomas* and *Frances Knackstone*, their heirs and assigns severally and not jointly, to repair and amend the same accordingly." It was contended that under these covenants, it was necessary that six months previous notice in writing should have been given to the tenant or assignee of the lease for the purpose of repairing, and that as such notice had not been proved, the defendant was entitled to a verdict on the plea of *non est factum*, as the first covenant only had been set out in the declaration. The jury, however, found a verdict for the plaintiffs, but the learned judge reserved the above points for the consideration of this court.

1817.

Wood

v.

Day.

1817.  
 WOOD  
 v.  
 DAY.

Mr. Serjt. *Copley*, in the course of the last term, obtained a rule *nisi*, that this verdict should be set aside, and a non-suit entered, and a new trial granted,—or that the judgment should be arrested;—on the latter ground he relied on *Treport's* case (a).

Mr. Serjt. *Onslow* and Mr. Serjt. *Blosset*, on a former day in this term, shewed cause, and observed as to the first objection, that *Frederick Hill* and *Frances* his wife had no legal title to the premises at the time of the demise, but that the plaintiffs derived their title from *Thomas* and *Frances Knackstone* only, that the averment in the declaration was supported both by law and by fact: That the demised premises were stated in the declaration to be of gavelkind, and that by the law of that tenure, which the courts were bound to take notice of judicially, a woman was entitled to dower during the existence of her widowhood only, but that such dower became forfeited on her intermarriage with another. The lease, in this case, appeared to have been made by *Frederick Hill* and *Frances* his wife, and *Thomas* and *Frances Knackstone*. The description of the parties, in the lease, therefore, proved the averment, that *Frances Hill* had no legal title,—notwithstanding the rent was reserved to *Frances Hill*, during her life; still, as *Thomas* and *Frances Knackstone* had a right to dispose of such rent as they pleased, there was nothing to prevent their allowing *Frances Hill* from receiving it for her life, as she was the mother of the one, and grandmother of the other.—Although *Frederick* and *Frances Hill* joined in the demise, still, as the rights of the parties appeared upon the face of the declaration, the lessors must be considered to have made the demise according to their respective estates, rights,

---

(a) 6 Coke, 14 (b).

and interests in the premises; and the lease therefore was a good lease to *Hans Sloane*; although *Frederick Hill*, who could have no legal interest, joined in the demise. It was not necessary, therefore, to set out the precise terms of the lease in the declaration, viz. "That the estate was vested in *Thomas* and *Frances Knackstone* only," although that was, in fact, its legal operation. The defendant has admitted that the interest of *Frances Hill* came to her by the custom of gavelkind, and that she was only interested during her widowhood. He has also admitted, that she intermarried with *Frederick Hill*, whereby her interest was forfeited before the lease was made. He has further admitted, that her moiety vested in *Thomas* and *Frances Knackstone*, in fee, on her intermarriage; and having admitted this, the plea, that she had a legal interest, at the time of the demise, was an affirmative issue for the defendant himself to have proved. Even if *Frances Hill* had any other right, it was incumbent on the defendant to have shewn it, and if the lease prove she had an interest, it could only be for her life, and then it becomes an immaterial issue, and is a sufficient answer to the second plea; for if she had an interest, it could only extend to her life, and as it was stated in the declaration, that the assignment to the defendant was made subsequent to her decease, such assignment was consequently a valid one.—With respect to the arrest of judgment, supposing *Frederick Hill*, and *Frances* his wife, had no legal interest in the premises, and that it should have been stated in the declaration to be the demise of *Thomas* and *Frances Knackstone* only, it was too late to be taken advantage of after verdict, the interest of *Frederick Hill* and *Frances* his wife being merely an inducement to the action. In *Treport's* case, the plea of not guilty, put in issue the demise as pleaded.—Here there is no issue on the demise of the four lessors, for the defendant has

1817.

WOOD  
v.  
DAY.



1817.  
 ~~~~~  
 WOOD  
 v.  
 DAY.

not denied that in his plea. The substantial grounds of the plaintiffs' title appeared upon the record. They derived it from *Thomas* and *Frances Knackstone*, who alone had the power to convey, for it appears that *Frederick Hill* and *Frances* his wife had no legal interest. At all events, this is not a title defectively set forth on the record, which cannot therefore be objected to after verdict; and the interest of *Frederick Hill* and *Frances* his wife is only an inducement to this action. They cited the case of *Honeywood v. Husbands* (a), where in an action for disturbance of common, the plaintiff derived his title from a demise by *A.* and *B.*—*A.* being tenant for life, and *B.* in reversion, and the same objection was made as in *Treport's* case;—it was held to be immaterial, for the particular estates were but as one conveyance to the action. They also referred to the case of *Chester v. Willan* (b).


With respect to the covenant to repair, the defendant could only take advantage of it on the plea of *non est factum*; and according to the terms of the lease, there are two distinct and independent covenants. This action is founded on the first, *viz.*: To yield and give up the premises in good and sufficient repair at the end of the term, and in order to support an action on the second, it would be incumbent on the lessors to have given notice to repair previously to the expiration of the lease, and such notice cannot apply to the yielding up the premises in good repair at the end of the term.

Mr. Serjt. *Copley* in support of the rule insisted, as to the first point, that if *Frederick Hill* and *Frances* his wife had any interest, it should have been stated in the declaration, and got rid of; but the plaintiffs have merely averred that they had no legal interest. The second plea is merely a

---

(a) *Cro. Eliz.* 153. *S. C.* 1 *Leon.* 177, by the name of *Hauswood v. Husbands*.—(b) 2 *Wms. Saund.* 96.

traverse of that allegation, and concludes to the country, whereas, if it contained a subsequent allegation, it must have concluded with a verification;—it has no reference to the interest of *Hill* and his wife as stated in the declaration. Still, if the case were to stand on the declaration, the plaintiffs deduced their title from *Frances Hill*, the widow. They stated that she lost her interest by intermarriage; that, therefore, should have been proved; but the demise *prima facie* shewed the contrary, as she and her husband were both parties to it. As to the arrest of judgment, he submitted that according to the established principle of law, a title must be set out according to its legal effect; it is the chief part of the substance of the plaintiffs' case, that their title should be properly deduced. *Treport's* case is expressly in point. There the plaintiff declared in ejectment on a lease made by *A.* and *B.*—*A.* was tenant for life; remainder to *B.* in fee. Both, by deed, joined in a lease to the plaintiff. The question was, whether this were the lease of both, and it was resolved that by the delivery of the deed, it was the lease of *A.*, during his life, and the confirmation of *B.*; and after the death of *A.*, it was the lease of *B.*, and the confirmation of *A.* And because the plaintiff had declared on a joint demise of *A.* and *B.*, it was adjudged against the plaintiff. The production of the deed in this case, was inconsistent with the declaration, as it there appeared, that four persons demised, and the plaintiffs had averred that *Friderick Hill* and his wife had no interest; as, therefore, the declaration alleged, that the interest was in *Thomas* and *Frances Knackstone*, only, the demise should have been stated to have been made by them alone. This, therefore, is a variance.—In the case of *Chester v. Willan*, there were three joint tenants for life; one of whom, by his deed, granted, bargained, sold, assigned, set over, and confirmed to

1817.  
  
*Wood*  
*v.*  
*Day.*

1817.  
  
 WOOD  
 v.  
 DAY.

another of the joint tenants, all the estate, title, &c. of the grantor, of and to the lands held in jointure, and the jury found that he granted;—that was deemed sufficient by verdict; but if the party had pleaded that he granted, the plea would be bad, for it should have been pleaded as a release, for every one must order his plea according to the rules of law, but it is otherwise of a verdict, because it is a saying of laymen. In *Osmere v. Sheafe* (a), where the court being of opinion that the grant of a rent, by deed, under the circumstances, operated as a covenant to stand seized; said, ‘That the defendant had done well in pleading it as a conveyance by way of ‘covenant to stand seized, for if he had pleaded it as a ‘grant of the rent, it would have been void.’ In order further to illustrate that a party must state the legal effect of a deed on a record, he referred to the case of *Baker v. Lade* (b), and if a deed be by the words *dedi et concessi*, &c.; yet, if it operates as a bargain and sale, it ought to be so pleaded. *Taylor v. Vale* (c). As, therefore, it appeared on the face of the declaration, that this was not a demise by four; and as on the production of the lease, the contrary was shewn, it should have been averred by the plaintiffs that it was a demise by two only, according to the legal effect of the instrument. The objection which has been taken, as to the covenants to repair, cannot be sustained, as it was clearly a variance from the lease, as stated in the declaration; and could therefore be taken advantage of under the plea of *non est factum*, as the latter part of the covenant was only a qualification of the former. It has been contended, that the notice to repair could not apply to the yielding up the premises at the end of the term, because the notice could not be given before the expira-

---

(a) *Carrth.* 308.—(b) 3 *Lrv.* 291. *S. C. 2 Wms. Saun.* 97. b, note, 2.—(c) *Cro. Eliz.* 166.

tion of the term. [Lord Chief Justice *Gibbs* mentioned the case of *Horsfall v. Testar* (a), to shew that a covenant by a lessee in an indenture of lease to repair the premises at all times, as often as need or occasion should require, and at farthest within three months, after notice, was one entire covenant, the former part of which was qualified by the latter.] This case comes within that of *Roe d. Goatly v. Paine* (b), as here the latter part of the notice to repair, merely qualifies the former part of the covenant. On the whole, therefore, the defendant is not liable, as it did not appear on the face of the declaration, whether the interest of *Frances Hill* existed for her life, or was extinguished, neither had the plaintiffs set out their title, according to the legal effect of the deed; and, lastly, there was a variance between the covenant to repair, and that set out in the declaration.

1817.  
 ~~~~~  
 WOOD  
 v.  
 DAY.

*Cur. adv. vult.*

Lord Chief Justice GIBBS, on this day, delivered the judgment of the court, as follows: This was a motion for a new trial, or in arrest of judgment. In order to understand the objections which have been raised to the plaintiff's right to recover, it will be necessary to consider the relative situations of the parties. It was an action of covenant brought against the assignee of the original lessee, in which the former was bound to the performance of the same covenants as the lessee was in the lease. The defendant, as assignee, held under an indenture of lease, by which *Frederick Hill*, and *Frances* his wife, and *Thomas* and *Frances Knackstone* demised to the lessee (*Hans Sloane*), who was estopped by executing the indenture from disputing the title of either of the parties from whom he took. It has been decided in the case of *Atkinson v. Coatsworth* (c), where it was attempted by an

---

(a) *Ante*, p. 89.—(b) 2 *Camp.* 520.—(c) 1 *Siran.* 512.

1817.  
 ~~~~~  
 WOOD  
 v.  
 DAY.

assignee of a lessee to dispute the title of the lessor from whom he took under an indenture, that the first deed being set out as an indenture made between the lessor and lessee, by which the latter covenanted to pay rent, it was an implicit averment of a sealing by him, and that if this were not so, still that the defendant, by covenanting to pay the rent reserved by the first indenture, was estopped, from saying that there was no such deed as could raise the rent. How then does this case stand? The action is brought against the assignee of a lessee, who is estopped from disputing the demise made by the four lessors. In what, therefore, does the difficulty consist? It was necessary for the plaintiffs to make out their title. Although the assignee is estopped from disputing the estate, which they demised, yet, as two of the lessors had no interest, if the plaintiffs had proved that they had any interest, it would be bad, but as they derived their title from two only, it was necessary for them to have shewn that the other two were not interested. It was only for this purpose, that the allegation in the declaration was introduced,—that the other two possessed no interest.—Between the lessor and lessee such allegation would be unnecessary. The only difficulty is to deduce the plaintiffs' title from the lessors. They derived their title from two only, and averred in the declaration, that the other two were dead, or had no interest, and that the property therefore passed to the plaintiffs by conveyance from the other two ;—these are the facts of the case. The plaintiffs alleged in their declaration, that *Thomas Knackstone*, the elder, was seized in fee of certain premises, which, on his death, by the custom of gavelkind, descended to his wife, for life, as to one moiety; and to his two sons, *Thomas* and *Francis*, as to the other. The title of the plaintiffs then stood thus: one moiety was vested in the widow, for her life, which was forfeited on her inter-

marriage with *Frederick Hill*. The plaintiffs then aver that the premises descended to *Thomas and Frances Knackstone*, who suffered *Frederick and Frances Hill* to remain in possession. It is then averred, that *Hill*, and his wife *Frances*, had no interest, although they joined in the demise with *Thomas and Frances Knackstone*. It is therefore sufficiently stated, that the two latter lessors only, were entitled, when they shewed that *Frederick Hill* and *Frances* his wife, had no legal interest. It is the obvious meaning of this allegation, that they acquired no other interest than what was granted to them by *Thomas and Frances Knackstone*. This is substantially an averment, that the legal effect of the demise was derived from *Thomas and Frances Knackstone*. Although the interests of the four lessors have been artificially pleaded; and although they all joined in the demise, still, in substance, two only were capable of demising. That circumstance distinguishes this from *Treport's* case, where the plaintiff, in order to make out his title, declared on a lease made by *A. and B.*, and it was stated, that the delivery by one, made it his lease alone, and a confirmation by the other; there the deed passed an interest, but here nothing passes, and it is on this ground that the doctrine of estoppel applies. As the defendant is estopped from disputing that the four demised, it is unnecessary to set out the legal effect of the lease which is artificially pleaded as having been demised by two only. The plaintiffs, in this case, have only to make out their title to the land. They did this, by shewing the conveyance from the two lessors, who had a right to convey, and on these grounds there can be no foundation for an arrest of judgment; and, as the defendant does not hold the premises from *Hans Sloane*, the plaintiffs cannot call on him to account for that lease. Two other objections have been raised, the one that there is no covenant in

1817.

Wood  
v.  
Day.

1817.  
WOOD  
v.  
DAY.

the lease, as stated in the declaration, as the covenant to repair in the declaration is general, and that six months notice was necessary, which was not proved at the trial, and that the latter must be incorporated with, and qualify the former; and that therefore such objection might avail on the plea of *non est factum*; but these are two distinct and separate covenants, and as the deed was not executed by the defendant, that plea will not avail him. It has further been objected, that *Frederick Hill* and *Frances* his wife, were not interested in the premises; but the indenture, by which they joined in the demise of the premises was proved; and, therefore, shewed that they possessed an interest. The plaintiffs have sufficiently proved their allegations in the declaration, by the production of the lease itself, as they have shewn that *Hill* and his wife had no other title in the premises, than what they derived by the sufferance and permission of *Thomas* and *Frances Knackstone*, who were, in fact, the only persons interested at the time the demise was granted. This, therefore, being an issue in law, is immaterial.—The allegation of the title of *Frederick Hill* and *Frances* his wife in the declaration is sufficient to shew that they were parties to the lease, by the permission of *Thomas* and *Frances Knackstone*. If the defendant had denied this, it would have been incumbent on him to have proved what other title they had. The plaintiffs have not failed in making out their title, by not having adduced evidence to shew the further interest of *Thomas* and *Frances Knackstone*; and there is therefore no ground to arrest the judgment, and the rule must be

Discharged.

## CRAVEN v. CRAVEN.

Saturday,  
June 21.

IN the course of the last term Mr. Serjt. *Pell* had obtained a rule *nisi* for setting aside an award, on the ground that it was not final, either in its terms or operation. It appeared by the submission to reference, that all actions and causes of action, and all matters in difference whatsoever, between the parties in this, and in another action, by the by, brought in trover, between the same parties, should be referred to the award and arbitration of a person therein named, as arbitrator. The arbitrator awarded that the plaintiff had no cause of action against the defendant in either of the actions referred to him; and, therefore, that in both of them, judgment should be entered for the defendant.—It was sworn by the plaintiff's attorney, that the plaintiff was advised, by counsel, that his claims upon the defendant were such, as a court of equity would decide on, and that he would there be entitled to relief. That counsel attended the arbitrator to argue in support of these claims, but that he considered the terms of the reference embraced only the two actions which were given in the order of reference, and declined to consider any questions which might, in their nature, belong to a court of equitable jurisdiction, and made his award as above stated. That the matters in difference in respect of which the two actions were brought, arose upon eight *Irish* canal loan debentures, the property of the plaintiff, which were admitted by the defendant, before the arbitrator, to have been obtained by him from the plaintiff's guardian during his minority, and converted to the plaintiff's use, by his having raised money on them, and employed it to his own use, but which debentures the

An arbitrator to whom all actions and causes of action, and all matters in difference whatsoever, in two actions subsisting between the same parties, have been referred, is not compelled to take matters of an equitable nature into consideration, but an award made by him in reference to the two actions only is final.



1817.  
 ~~~~~  
 CRAVEN  
 v.  
 CRAVEN.

plaintiff had never possessed.—As, therefore, the arbitrator had confined his award to the disposal of the two actions at law, and rejected the equitable claims of the plaintiff, his award was not final, as the terms of the order of reference were sufficiently comprehensive to enable the arbitrator to have considered such claims.

Mr. Serjt. *Lens*, on a former day in this term, was about to shew cause against this rule, and suggested that the affidavit, on which the rule was granted, ought to have shewn the nature of the claims in equity from which the plaintiff expected to be relieved;—the court conceiving they might have granted the rule inconsiderately, enlarged it, for the purpose of the arbitrator's contradicting the facts contained in the affidavit of the plaintiff's attorney.—It now appearing by the arbitrator's affidavit that the parties attended him at five different meetings, and that he was decidedly of opinion, after having heard the whole of the evidence, that the plaintiff had no grounds to support the actions, and that at the last of these meetings having heard the argument of the plaintiff's counsel, as to his relief in a court of equity, he considered it did not apply to, or govern the matters referred to him, but that being still of the same opinion, as to the plaintiff's claims, all of which arose out of the transactions which constituted the subject matter of the plaintiff's demands, in the two actions, he considered that he had left nothing undisposed of, and made his award accordingly.

Mr. Serjt. *Pell* in support of the rule, still submitted, that the award was not final, as the arbitrator had confined himself to the two actions alone, without adverting to all other matters in difference, between the parties. The award refers to these two actions only, and not to all matters in difference. If there were a subject of equitable jurisdiction open between the parties, the award did

not conclude the parties from applying for relief in equity, and it is not therefore final. It was the evident intention of the parties, that all matters in difference between them, should have been left to the decision of an arbitrator, and the rule was sufficiently extensive for him to have so decided; but as he has confined himself to the two actions only, the plaintiff may file a bill in equity against the defendant, notwithstanding the award. As the order of reference extended to all matters of equity, as well as of law, this could not be considered a final adjudication.

Lord Chief Justice GIBBS.—The question to be considered is, whether this award be final, and if so, whether the arbitrator has so conducted himself, as to afford a fair ground of complaint to the plaintiff, who has moved to set it aside. With regard to its not being final, and not to be pleaded in bar, as it was a reference of all matters in difference, it certainly ought to conclude all the then existing disputes between the parties. The arbitrator has stated that all matters in difference were referred to him, and in making his award, having heard the parties and examined the papers relative to those matters, awarded that the plaintiff had no cause of action against the defendant in either of the two actions so referred to him. That award being applicable to all the matters in difference, referred by the premises in the order of reference, winds up the whole, and shews, that the only claims between the parties, on which the arbitrator could decide, extended solely to the two actions in question. I think that although the arbitrator might have made his award with more precision, still that it is final, as to the matters referred to him.—I perfectly agree with my brother *Lens*, that the affidavit made in support of this rule, ought to have shewn the nature of the equitable claims, and not to

1817.  
 CRAVEN  
 v.  
 CRAVEN.

1817.  
CRAVEN  
v.  
CRAVEN.

have been confined to abstract propositions. The plaintiff should have submitted to the arbitrator the precise points he wished him to consider, and should then have stated these points with equal precision to the court. But he merely complains that the arbitrator would not enter into any equitable matters. He attended the arbitrator by counsel, who argued his equitable rights, still the arbitrator did not consider the arguments applicable to the matters in difference before him, and therefore decided accordingly. It appears that he objected to nothing offered by the plaintiff, in support of his claims, that he fully considered all matters referred to him, and that the transactions, which constituted the subject matter of the plaintiff's demand, arose from the two actions pending between him and the defendant. On the whole, therefore, I am of opinion that there is no ground to set aside this award, on account of its not being final, or that the arbitrator had refused to determine all matters which had been referred to him.

Mr. Justice DALLAS.—I am of the same opinion, and consider that the conduct of the arbitrator was perfectly correct.

Mr. Justice PARK.—The plaintiff should certainly have stated to the court the relief he expected in equity, and have also shewn in what the misconduct of the arbitrator consisted.

Mr. Justice BURROUGH concurred.

Rule discharged.

## HOPPER and Wife v. REEVE.

Monday,  
June 23th.

THIS was an action of trespass in which the plaintiffs, as husband and wife, declared that the defendant, with force and arms, drove a one horse chaise, which he was then driving along the king's highway, with great force and violence, against a one horse chaise, in which the wife was then riding, whereby she was cast and thrown out of the last-mentioned chaise on the ground, and much bruised, hurt, and wounded.—The defendant pleaded, *first*, not guilty; and, *secondly*, a special plea of justification, on which issue was joined.—The cause was tried before Mr. Justice *Abbott*, at the last assizes at *Winchester*, when the jury found a verdict for the plaintiffs, for £12.

In an action of trespass by husband and wife, in which they declared that the defendant drove a chaise against another chaise, in which the wife was then riding, whereby she was thrown out, and sustained an injury.—On a motion in arrest of judgment, *held*, that the plaintiff's remedy was trespass, and not case, and that it was unnecessary to state to whom the plaintiff's chaise belonged, at the time the accident happened.

Mr. Serjt. *Pell*, in the course of the last term, obtained a rule *nisi*, that the judgment should be arrested on the grounds that the plaintiffs should have declared in case, and that the declaration was insufficient, inasmuch as it was not therein alleged, that the chaise, in which the wife was riding, was the property of the plaintiffs.

Mr. Serjt. *Leins* now shewed cause, and premised, that the question, whether the present action of trespass was maintainable, could not arise in this stage of the cause, as this motion was in the nature of a demurrer to the declaration. It must be inferred, that the chaise belonged to the plaintiffs, for the wife's riding in it is *prima facie* evidence of possession. This objection, however, should have been taken advantage of by a special demurrer.—Had the property of the chaise been in a third person, it might have been proved in evidence; but after verdict, where no such evidence has been offered, it must be taken to have been in the possession of the wife,

1817.  
HOPPER  
v.  
REEVE.

which in law would pass an interest to the plaintiff. This motion being merely in arrest of judgment, it must be considered that the act was done with force and violence, in which event the present action can be supported. Had the action been case, it would have been necessary for the plaintiffs to have averred, that the chaise was in the possession either of themselves or of a third person; but there is no ground for saying that an action on the case is here maintainable. These objections, therefore, cannot be taken advantage of after verdict, and since there is no reason to suppose that the chaise was not in the possession of the plaintiffs, and as the husband has sustained damage for the injury occasioned to his wife, the verdict ought to stand.

Mr. Serjt. *Pell*, in support of the rule, submitted that the act complained of in the record, did not amount to trespass, but that an action on the case was the plaintiffs proper remedy. They have not declared in whose possession the chaise was, and it may therefore be inferred to have belonged to another, and the subject matter being a consequential injury, is applicable only to an action on the case. In order to support this action, it must be proved that the injury sustained by the wife was immediate; but here the injury happened in consequence of overturning a chaise in which it did not appear that the plaintiffs had any possession. The immediate wrong was not stated to have been committed against the chaise of the plaintiffs, as it might have belonged to a third person, and the injury sustained by the wife is not immediate, but consequential. In the case of *Pitts v. Gainet, and another (a)*, which was an action on the case for entering and seizing a ship, where it was objected that the plaintiff ought to have brought trespass, Lord Chief Justice

---

(a) 1 *Ld. Raym.* 558.

*Holt* said, that 'the plaintiff might have had trespass, and declared that he was possessed of the ship, and founded his action upon the possession; but that when he brought the action as master, he could not have trespass, but case. A bailee might maintain trespass, but then he ought to declare upon his possession.'—As the injury, in this case, accrued to the wife, in consequence of the chaise in which she was riding being overturned, it was necessary to have shewn who was interested in, or had the possession of such chaise. In *Reynolds v. Clarke* (a), the distinction is laid down, where the immediate act is an injury to the plaintiff's person, and where it is not. In *Leame v. Bray* (b), it appeared in the declaration, that the defendant drove against the plaintiffs' carriage; but as here the possession has not been stated, he insisted that the judgment must be arrested.

Mr. Serjt. *Lens* observed, that the cases which had been cited were inapplicable, as this action was brought by baron and feme, for an injury done to the latter, and not to the carriage. That the possession of the chaise could not affect the question, as the act of the overturning it, and throwing the wife on the ground, was one and the same injury.

Lord Chief Justice *GIBBS*.—I do not think there is any reason to notice the objections raised in the arguments; for the law, both on the parts of the plaintiffs, and of the defendant, has been correctly stated. The facts of this case do not come within the principles of these which have been cited by my brother *Pell*, this being an action of trespass for a personal injury sustained by one of the plaintiffs. If a person knock over a chair on which another is sitting, and knock down such person

1817.

HOPPER  
v.  
REEVE.

---

(a) 2 *Ld. Raym.* 1402, S. C. 1 *Stran.* 635.—(b) 3 *E. R.* 593.

1817.  
 ~~~~~  
 HOPPER  
 v.  
 REEVE.

at the same time, by which he sustains an injury, there can be no doubt but that his remedy would be by an action of trespass.

*Per Curiam.*

Rule discharged (a).

---

(a) See *Covell v. Laming*. 1 Camp. 497, and *Lotan v. Cox*. 2 Camp. 465.

Wednesday,  
 June 25th.

DAVIES v. Lord RENDLESHAM.

If an *Irish* peer be sued by bill, the court will not set aside the proceedings on motion; but leave him to plead his privilege in abatement.

MR. Serjt. *Copley* had obtained a rule to shew *cause* why the proceedings, in this case, should not be set aside for irregularity, with costs; on the ground that the defendant, an *Irish* peer, should have been sued by original writ, and not by bill. He relied on the case of *The Earl of Lonsdale v. Littledale* (a), and insisted that the defendant was intitled to all the privileges of a peer of *Great Britain* (b), and that since the decision of that case he could only be sued by special original in the *King's Bench*.

Mr. Serjt. *Best*, on a subsequent day, shewed *cause*, when it appeared by an affidavit of the clerk to the defendant's attorney, that on the 13th of *May* last, an original bill was filed in this court by the plaintiff against the defendant, as having privilege of parliament "upon several promises," in which bill the plaintiff laid his damages at £3400. On this, a writ of summons directed to the sheriff of *Suffolk* had been issued against the defendant, upon which he was duly summoned on the 19th of

---

(a) 2 *H. Bl.* 267. 299.—(b) See the act of union, 39 & 40 *G. 3. c.* 67. art. 4.

*May* last. And that the defendant was, as he *verily believed*, a baron of *Ireland*, and was then or lately residing at *Geneva*, and that he was not a member of the house of commons.—He contended that this affidavit was insufficient, as it ought to have stated positively, that the defendant was an *Irish* peer. At all events, it was necessary to have shewn, that he was such peer. He cited an anonymous case (*a*), where the Countess of *Huntingdon* was discharged by *supersedeas*, it appearing by the record that she was a peeress.—Even if the affidavit were sufficient, the irregularity complained of could not be taken advantage of by motion in this stage of the proceedings, but the defendant should have pleaded his privilege in abatement. In support of this proposition, he cited the case of *Gasling v. Lord Weymouth* (*b*), where the defendant pleaded his privilege to the jurisdiction of the court. So in *Lansdale v. Littledale*, the objection was taken by writ of error, and in *Hosier v. Lord Arundell* (*c*) this court said that if a peer be sued by bill, no objection can be taken to such proceeding except by plea in abatement. The decisions in the *King's Bench* do not apply to this court, for that court can hold plea by bill, in no instance, except where the defendant is in the actual or supposed custody of the marshal; but as a peer could not be legally arrested in a civil suit, he could not, in reality, be in such custody.

Mr. Serjt. *Copley* in support of the rule submitted that this objection might be made either by motion, or by plea in abatement. The case of *Briscoe v. The Earl of Egremont* (*d*), which was a motion to set aside the proceedings for irregularity, was distinguishable from the present, as the defendant there had been served with a

1817.  
  
 DAVIES  
 v.  
 RENDLESHAM.

---

(*a*) 1 *Vent.* 298.—(*b*) *Cowp.* 844.—(*c*) 3 *B. & P.* 7.—  
 (*d*) 3 *M. & S.* 88.



1817.  
 ~~~~~  
 DAVIES  
 v.  
 RENDLESHAM.

copy of a bill of *Middlesex*, issued against him jointly with other defendants, and the affidavit did not shew him to be a peer. The process here being therefore irregular, the proceedings may be set aside without pleading, as in the case before referred to in *Ventris*. In Lord *Banbury's* case (*a*), where a *latitat* was sued out against him, by the name of *Charles Knollys, Esq.*, it was agreed that if the *latitat* had been issued by the name of *Lord*, it should have been superseded: where the process therefore is irregular, the defendant may take advantage of it by motion. This being a *prima facie* case, the affidavit, as to belief, is sufficient, and the plaintiff should have contradicted the facts there stated.—In the court of *King's Bench*, peers could only have been sued by original writ, previously to the statute 12 and 13 *W. 3*, c. 3, and that process cannot apply to this court. He cited the case of *Dawson v. Burridge* (*b*). Since therefore, there has been an irregularity in the process, the defendant may proceed as in the case of a *misnomer*, namely, either by an application to the court to set aside the proceedings, or by pleading his privilege in abatement.

Lord Chief Justice GIBBS.—We doubt whether we can go into the merits of this case on motion. It is different from those that have been cited, as the irregularity depends on a question of law. Besides, the defendant has a remedy by plea in abatement, in which this question might have been more properly raised.

The court took time to consider whether the point should be further discussed on this motion, and,

On this day, his Lordship said: This was an application to set aside the proceedings, on the ground that the defendant, an *Irish* peer, could not be sued in this court, by original bill, but as this may be taken advantage of by

---

(*a*) *Salk.* 512. *S. C.* 2 *Ld. Raym.* 1247.—(*b*) 2 *Ld. Raym.* 1442.

a plea in abatement, the court think it fit to leave him to the remedy he may obtain from that plea; and considering that this is too important a question to be decided on motion, the rule must be

1817.  
 DAVIES  
 v.  
 RENDLESHAM.

Discharged (a).

---

(a) See note, *Imp. Prac. C. P. 6 Ed.* 530.

NIXON v. BURT, Clerk.

REED v. same.

Wednesday,  
 June 25th.

Mr. Serjt. Pell, on a former day in this term, had obtained a rule *nisi*, that the defendant should be discharged out of the custody of the sheriff of *Somerset* on entering a common appearance.—By a writ of *mandamus*, issued out of the court of *King's Bench*, directed to the mayor, aldermen, and capital burgesses, or counsellors of the borough of *Bridgewater*, in the county of *Somerset*, after reciting that by the usage and custom of that borough every person who was entitled to be admitted into the office of a free burgess, could only be admitted and sworn into such office, by or before the mayor and capital burgesses or counsellors of the borough or the major part of them, and that one of the aldermen, and four of the capital burgesses or counsellors had lately died, and that no election or swearing any person or persons to be an alderman or a capital burgess or counsellor had been made since their death, by reason whereof these offices remained vacant. It was commanded the mayor, aldermen, &c., that after the receipt of the said writ, they should meet at the *Burgess-hall*, within the *Guildhall*

A capital burgess of a borough attending an election of co-burgesses under a summons from the mayor, issued in obedience to a *mandamus*, directing the corporation to proceed to such election, is not privileged from arrest during his attendance there for that purpose.

1817.  
 NIXON  
 v.  
 BURT.

of the said borough, and there in due manner elect, nominate, and swear, and do every act in order to the election, nomination, and swearing of one of the capital burgesses to be an alderman of the borough, in the room of the alderman so dead. And that they should there admit and swear into the office of a free burges of the borough, every person entitled, who should tender himself, in order to be admitted: and also there, in due manner, make, elect, admit, and swear, such inhabitants of the borough, as they, or the major part of them should think fit, to be a free burges: and, also, there elect, nominate, make and swear, and do every act necessary, in order to the election, nomination, making and swearing of four of the free burgesses of the said borough, to be capital burgesses or counsellors in the places of those capital burgesses who were dead.—His motion was founded on an affidavit of the defendant, which stated that he was a capital burges and common counselman of the borough of *Bridgewater*; and that on the 28th of *May* last, he was served with a copy of the writ of *mandamus*, issued as aforesaid, together with a summons from the mayor of *Bridgewater*, whereby he was, in obedience to the writ, summoned to appear and give his attendance at the *Council-house*, or *Burghall*, within the *Guildhall* of the said borough, on the 2d of *June*, by eleven o'clock in the forenoon, at a court of convocation of the mayor, aldermen, &c., to be holden in the same house, in obedience to such writ of *mandamus*. That in compliance with this writ and summons, he left *London* on the 31st of *May*, and arrived at *Bridgewater* the following evening; and that at seven o'clock in the morning of the 2d of *June* (the day appointed for his attendance) he was arrested by virtue of a warrant from the sheriff of *Somerset*, at the suit of the plaintiff, and that although he informed the officer who arrested him, that

he was a capital burgess of *Bridgewater*, and was come there to attend a meeting of the corporation, in obedience to the writ of *mandamus*, which he shewed him, that such officer refused to discharge him out of custody, but compelled him to enter into a bail-bond. That he afterwards attended the convocation, when an alderman, four free burgesses, and four capital burgesses, were elected by him, and the other members of the corporation then present. That he left *Bridgewater* as soon as the election terminated, and arrived in *London* on the day following; and that he went to *Bridgewater* for the express purpose of obeying the writ of *mandamus*.—The defendant's attorney, in *London*, also swore that he caused a copy of the writ of *mandamus* to be served on him there.

Mr. Serjt. *Lens*, on a subsequent day, shewed cause and observed, that the only question was, whether the defendant were privileged from arrest, under the circumstances above stated. He was not aware of any case which bore an analogy to the present; and it must therefore be determined on principle, which was difficult to be ascertained, except by prior cases, or established practice. The *mandamus* was addressed to the aggregate body of the corporation, requiring each individual member to attend, but was not addressed individually to the defendant, whose attendance was only required by a summons from the mayor, which was issued in obedience to the writ. It was therefore incumbent on the defendant, to entitle himself to the benefit he now sought, to have shewn by what means he was privileged from the arrest. With respect to witnesses, as well as to parties to a suit being privileged from arrest, such protection was referable to another principle, viz. that of facilitating public justice, and the case of *Meekins v. Smith (a)*, shews

1817.

NIXON

v.

BURT.

(a) 1 *H. Bl.* 636. See also, *Lightfoot v. Cameron*, 2 *Sir W. Black.* 1113.

1817.  
 NIXON  
 v.  
 BURT.

in the fullest extent to what persons this privilege extends. So, in *Spence v. Stuart* (a) this privilege was extended to an arbitrator, in a suit under an order of *Nisi Prius*. Such attendance was also necessary for the attainment of justice. In *Comyns's Digest* (b) all the cases are collected in which persons attending the courts of justice, are privileged from arrest, but neither of these can be considered applicable to the present. Although it was the duty of the mayor and corporation to elect their officers, yet such election was limited to the corporation only; and although they might experience an inconvenience by the non-election of such officers, still it would have reference to a private rather than a public injury, and was altogether distinct from the administration of public justice. Had the absolute attendance of the defendant been essential, it was necessary that a special application should have been made to him. He ought to have shewn that the corporation could not have proceeded to an election without his presence. As, therefore, this case can be governed by no general rule, nor is analogous to any principles on which former cases have been decided; and as the defendant was summoned in *London*, by the mayor of *Bridgewater*, to attend there by virtue of a *mandamus*, addressed to the whole corporation, he was not entitled to his discharge, on having been arrested at the latter place.

Mr. Serjt. *Pell*, in support of the rule observed, that the case came within the principles laid down in those where the defendant was privileged from arrest, as it depended entirely on the authority of the writ of *mandamus*, by which the defendant was required to attend the election of the officers at *Bridgewater*. Although the writ was directed

---

(a) 3 E. R. 89.—(b) tit. *Privilege* (A.)

to the mayor, aldermen, and capital burgesses, it could only be delivered to the former, as the presiding or head officer. The object of the writ of *mandamus* was to compel a meeting of the corporation, and is in itself a high prerogative writ, of a most extensively remedial nature. The attendance on this writ therefore was equally imperative on the defendant, as an attendance in furtherance of public justice. Had the object of the meeting been prevented by his non-attendance, and the mayor been called on to make a return to the writ, and he had returned that he could not convene a sufficient number of corporators to proceed to the election of officers; or that officers could not be elected in consequence of the defendant's absence, such return would be bad, for in the one case, had the voters been equal, the mayor would have been liable to an attachment; and the dread of arrest by the defendant, would not be a sufficient ground for his absence. In the case of *Miller v. Seare (a)*, which was an action against commissioners of bankrupt in improperly committing a bankrupt who had made a satisfactory answer, Lord Chief Justice *De Grey* said, 'that the commissioners were a court of justice sufficient for the purpose of having their witnesses protected at least by the court of *Chancery*, if not by themselves, else witnesses would be in a strange dilemma; if they did not appear, they were liable to be committed by that court for their contempt, and if they did, they were liable to arrests, which would be absurd, and therefore impossible.'—The question here is, whether the defendant would not have been liable to an attachment for contempt if he had not obeyed the summons under the writ. Privileges from arrests require a liberal construction, and are

1817.  
 ~~~~~  
 NIXON  
 v.  
 BURT.

---

(a) 2 Sir *W. Black.* 1142.

1817.  
 NIXON  
 v.  
 BURT.

daily extended. Although the court of *King's Bench*, in the case of *Kinder v. Williams* (a), refused to discharge a person in custody by process of the sheriff's court, in a cause afterwards removed into the *King's Bench*, because he was arrested while attending commissioners of bankrupt to prove a debt; yet, the *Lord Chancellor* discharged a person who was attending the commissioners as a witness. *King's* case (b). And in *Ex parte List* (c), a creditor attending to prove his debt, was held to be protected. The attendance of the defendant, in this case, being in obedience to the summons issued under the writ of *mandamus*, entitled him to protection, as such attendance was of more consequence than bail and barristers, who, according to the decision in *Meekins v. Smith*, were held to be privileged from arrest during the time of their attending a court of justice.

*Cur. adv. vult.*

Lord Chief Justice GIBBS, on this day, delivered the judgment of the court. In these actions, the defendant sought to be discharged on filing common bail, on the ground that he had been arrested on his way to attend an election of an alderman and burgesses of the borough of *Bridgewater*, of which he himself was a corporator, and that he attended such election in obedience to a writ of *mandamus*, which had been issued for that purpose. No case has been alluded to in the argument, which bears the slightest resemblance to the present;—we must therefore decide on principle. The defendant claimed his privilege on the ground that he was performing an incumbent duty prescribed by the terms in the writ of *mandamus*, and that if he had not performed such duty he would have been liable to personal

(a) 4 T. R. 377.—(b) Cited in 1 Tidd, 5th edit. 198, n.—  
 (c) 2 Rose 24.

punishment. It is quite clear that if no *mandamus* had issued, that the attendance of the defendant at the election, under the circumstances of this case, would not have privileged him from arrest. Elections, of this nature, are of daily occurrence, and as no instance has been referred to, where a defendant has been considered entitled to this privilege, we think there is no ground for his being discharged. Here too, the election was enforced by virtue of a *mandamus*, not directed to the defendant individually, but to the corporation at large, and was served on the mayor of such corporation as the presiding officer. Although such service is sufficient, still the case would have been widely different, if the *mandamus* had been addressed to, and served personally on the defendant. It is however unnecessary to state the effects which might be produced by such service. It has been insisted for the defendant that he is entitled to this privilege, under the writ of *mandamus*; and it has been further said, that had he not attended in obedience to the writ, he would have been liable to an attachment, or some other punishment. Under certain circumstances he might be so, but unless the election were actually prevented by his non-attendance, his liability would not have attached. His being merely incidentally or eventually subject to an attachment for not attending the election is not sufficient to protect him from arrest. There is another circumstance which has not been adverted to in the argument for the plaintiff.—Lord Chief Justice *De Grey*, in the case of *Cameron v. Lightfoot* (a), has said, ‘that the allowing ‘or not allowing this privilege was discretionary, and that ‘it had been disallowed in collusive actions, for which he ‘cited *Rastall*, 476 (b).’—In this case the defendant was

1817.

NIXON  
v.  
BURT.

(a) 2 Sir *W. Black.* 1190.—(b) All the authorities connected with the privilege from arrest, are referred to in that judgment.



1817.  
 NIXON  
 v.  
 BURT.

arrested in both actions at *Bridgewater*, which is distant one hundred and fifty miles from *London* where he resides. Was it necessary for the mayor to summon the whole of the burgesses for this election, when a major part of them would answer the terms of the *mandamus*, or was it actually incumbent on the mayor to summon the defendant, who lived at so great a distance from *Bridgewater*? It appeared, too, that the person who served him with the summons to attend at *Bridgewater*, was his own attorney in *London*;—this looks like an understanding or collusion between the defendant and his attorney. Under all the circumstances of this case, therefore, we are of opinion that the defendant is not entitled to the privilege he sought for, and that the rule must be

Discharged, with costs.

Wednesday,  
 June 25th.

JOHNSON v. NORTHWOOD.

If, to a declaration, stating, that the defendant made an assault on the plaintiff, and beat, bruised, wounded, and ill-treated him, the defendant plead the general issue, and a justification as to the assaulting

and ill-treating only, by a plea of *molliter manus imposuit*.—*Held*, that such latter plea admitted a battery, and that the plaintiff was entitled to full costs, although he had obtained a verdict for 1s. damages only, and the judge had not certified at the trial.

THIS was an action of trespass for an assault and battery.—The declaration stated, that the defendant with force and arms, &c. made an assault on the plaintiff, and beat, bruised, wounded, and ill-treated him. The defendant pleaded, *first*, not guilty; *secondly*, as to the assaulting and ill-treating the plaintiff, that one *Richard Bass* was lawfully possessed of a dwelling-house, and that a boy, unknown to the defendant, and *Bass*, just

before the said time, when, &c. was unlawfully in the house, making a great noise and disturbance therein, and that thereupon *Bass* requested the boy to cease from making such noise, and to quit his house, which he refused to do; whereupon the defendant, as the servant of *Bass*, and by his command, gently laid his hands upon the boy to remove him from the house, when the plaintiff unlawfully interfered to prevent the defendant from turning the boy out of the house, and unlawfully assisted the boy in remaining therein, making such noise, whereupon the defendant, as the servant of *Bass*, and by his command, gently laid his hands upon the plaintiff, in order to prevent him from unlawfully interfering to prevent the boy from being removed from the house, and from unlawfully assisting the boy from remaining therein, making such noise, as he lawfully might for the cause aforesaid, which were the same trespasses in the introductory part of that plea mentioned, whereof the plaintiff had above complained thereof against him, and concluded with a traverse that the defendant was guilty of the supposed assault and trespasses, or any of them, elsewhere than in the dwelling-house of *Bass*. *Thirdly*, as to the same trespasses in the introduction to the second plea mentioned, that *Bass*, being so possessed of the house, the plaintiff was unlawfully therein making a great noise, and so continued making such noise against the will of *Bass*, and that thereupon *Bass* requested the plaintiff to cease from making such noise and to leave the house, which he refused to do, whereupon the defendant, as the servant of *Bass*, and by his command, gently laid his hands upon the plaintiff, in order to remove, and did remove him out of the house, as he lawfully might for the cause aforesaid, which were the same trespasses in the introduction to that plea mentioned and referred to, and whereof the plaintiff had complained against him; and concluded with a traverse as in the second plea. The

1817.

JOHNSON  
v.

NORTHWOOD.

1817.  
JOHNSON  
v.  
NORTHWOOD.

plaintiff added a *similiter* to the plea of not guilty, and replied to the second, that the defendant assaulted, beat, and ill-treated him, *de injuria sua propria*; and to the third, that the defendant, *de injuria*, committed the several trespasses in the introductory part of that plea mentioned, upon which issue was joined. On the trial a verdict was entered for the plaintiff, with damages one shilling, and 40s. costs.

Mr. Serjt. *Copley*, in the last *Hilary* term, had obtained a rule *nisi*, that the associate should amend his entry and the *postea*, by reducing the finding of forty shillings costs, to one shilling, as the judge had not certified at the trial. He relied on the stat. 22 and 23 *Car. 2, c. 9 (a)*; and the cases of *Page v. Creed (b)*, *Brennan* and *Wife v. Redmond (c)*, and *Smith v. Edge (d)*.

Mr. Serjt. *Best*, in the course of the last term, shewed cause, and insisted that sufficient appeared upon the face of the defendant's pleas, to admit a battery, which being equivalent to the certificate of a judge, the plaintiff was entitled to his costs. The removal of the plaintiff from the house of *Bass* was sufficient to constitute a battery. In *Comyn's Digest (e)* it is laid down, that if a man push or thrust another in anger, or hold him by his arm, it amounts to a battery, and Mr. Justice *Blackstone*, in his *Commentaries (f)*, remarks 'that the least touching another's person wilfully, or in anger, is a battery.'—The case of *Smith v. Edge* must govern the present; where Lord *Kenyon* said, 'that the question was, whether laying hold

---

(a) By which it is enacted, 'That in all actions of trespass and assault and battery, wherein the judge, at the trial of the cause, shall not find and certify under his hand upon the back of the record, that an assault and battery was sufficiently proved by the plaintiff against the defendant, the plaintiff in such action, in case the jury shall find the damages to be under the value of forty shillings, shall not recover, or obtain more costs of suit than the damages so found shall amount unto.'

(b) 3 *T. R.* 391.—(c) 1 *Taunt.* 16.—(d) 6 *T. R.* 562.—(e) *Tit. Battery, (A.)*—(f) 3 *Vol.* 180.

‘ of the plaintiff in a church and turning him out, were ‘ a battery or not,’ and it was held that it was; so here, the plaintiff having been turned out of *Bass’s* house, amounted to a battery.—[Mr. Justice *Burroughs*.—If the declaration had only stated, that the defendant laid his hands on the plaintiff and turned him out, it would be a battery.]—The cases of *Page v. Creed* and *Brennan v. Redmond*, are distinguishable, as the defendant there justified the assault only; and in this case, the pleas justified the assaulting and ill-treating the plaintiff, and the plaintiff replied, to the second plea, that the defendant assaulted, beat, and ill-treated him. If, therefore, it appear from the whole of the record, that the defendant has justified the battery, the plaintiff is entitled to his costs; and, although, at the commencement of the pleas, the defendant has justified the assaulting and ill-treating only; still, in the body of them he has stated, that he gently laid his hands on the plaintiff, which is alone sufficient to constitute a battery; but even the word ill-treating may extend to a battery, as containing a general description of the injury done to the plaintiff. Although every *molliter manus* is not a battery (a), still, the intention of the party must be looked to, for there is a wide distinction between an accidental or gentle laying on of hands, and the turning a man forcibly out of a house; and, as the jury have found, by their verdict, that this was not a *molliter manus*, it clearly amounts to a battery. This case, therefore, is not to be distinguished from that of *Smith v. Edge*, and as sufficient appeared upon the defendant’s pleas, to justify the battery, he insisted that the rule must be discharged.

Mr. Serjt. *Vaughan* and Mr. Serjt. *Copley*, in support of the rule, premised, that if the battery was not fully

1817.  
JOHNSON  
v.  
NORTHWOOD.

---

(a) Rep. *Temp. Hardw.* 301.

1817.  
 JOHNSON  
 v.  
 NORTHWOOD.

admitted on the record by the defendant, or the judge had not certified at the trial, the plaintiff could recover no more costs than damages.—The only question is, whether the battery was admitted by the second and third pleas. It is impossible that assaulting and ill-treating can amount to battery; and the defendant, therefore, only intended to justify the assault and ill-treatment, which terms cannot comprehend the beating, bruising, and wounding, as stated in the declaration.—In *Comyns's Digest* (a), it is laid down that a man cannot justify the battery of a servant, by which the plaintiff lost his service, by *molliter manus imposuit*, nor can a man justify violent measures by such plea (b).—The plaintiff should have new assigned, or replied that the defendant used violence or excess of force. In the case of *Gregory v. Hill* (c), the court of *King's Bench* said, that though a plea of *molliter manus imposuit* would justify what the law considered as an assault, such as might be necessary to have put a party out of a house, without outrage and violence; yet it was never considered as any answer to a charge of beating, wounding, and knocking a party down, as was contained in the declaration in that case. The body of these pleas, therefore, did not admit a battery. The case of *Page v. Creed*, is not to be distinguished from the present, as it does not appear that the jury have found a verdict for the battery, but for the assault only. It was necessary that it should have appeared on the record, that the battery was actually committed. Every assault amounts to ill-treating; and, therefore, the defendant intended only to justify such assault and ill-treating, and the conclusion to his pleas refers to the introductory part of them, *viz.* as to the assaulting and ill-treating only. Although the word beat is introduced by the plaintiff in the repli-

---

(a) Tit. Pleader, 3 M. 16.—(b) *Id. ibid.*—(c) 6 T. R. 299.

cation to the second plea, it is immaterial, for the only question is, whether the defendant had admitted the battery in his pleas. It has been contended that although the introduction of the pleas justify a part of the trespasses only, as alleged in the declaration; still, as it was stated therein, that the plaintiff was removed by the defendant from the house of *Bass*, it was sufficient to constitute a battery; but, if the introduction justified the assault only, and the *molliter manus* would amount to a battery, the pleas would be bad on demurrer, or on writ of error. They referred to *Herlackenden's* case (a). If the defendant therefore had justified more in the body of the pleas than in the commencement, they would be bad; but as a *molliter manus imposuit* does not admit a battery, these pleas are good. They referred to *Coke's Entries* (b), and *Brownlow's Entries* (c), to shew that a plea of *molliter manus imposuit* did not admit a battery.—The case of *Carr v. Donne* (d), clearly shews that a plea of *molliter manus imposuit* does not imply a battery.—[Mr. Justice Burrough. In an *Anonymous* case (e), it was held, that where the defendant drew a sword and waved it in a menacing manner against the plaintiff, but did not touch him, that he was guilty of an assault, and not of a battery. The distinction may be drawn therefore from this case, that touching a man may amount to battery, but that a mere menace is an assault only.—So in *Cole v. Turner* (f) it was held, that touching another in anger, though in the slightest degree or under pretence of passing, was a battery. If, therefore, the removal of the plaintiff from the house did not amount to battery, all the prior cases would be negatived.] It

1817.

JOHNSON  
v.  
NORTHWOOD.

---

(a) 4 *Coke* 62. See also 1 *Wms. Saunders*, 27, n. 3.—(b) 303.  
—(c) *French* edit. restored, 409. 487.—(d) 2 *Vent.* 193.—  
(e) 1 *Vent.* 256.—(f) 6 *Mod. Rep.* 149.

1817.  
JOHNSON  
v.  
NORTHWOOD.

does not appear that the plaintiff was removed from the house in a violent or menacing manner, or that the defendant was *irâ motus*, and as the plea of *molliter manus imposuit* does not imply a battery, and the defendant has justified the assault and ill-treatment only, they submitted that the plaintiff was entitled to no more costs than damages.

The court being desirous of obtaining the record in the case of *Page v. Creed* to discover whether the defendant had there pleaded a *molliter manus imposuit*, postponed their decision, and as such record could not be procured,

Mr. Justice DALLAS on this day delivered the judgment as follows: This was an action of trespass for an assault and battery. The declaration stated that the defendant, with force and arms, made an assault on the plaintiff, and beat, bruised, wounded, and ill-treated him. The defendant pleaded the general issue, and two special pleas, omitting the beating, bruising, and wounding, as stated in the declaration, and justifying the assaulting and ill-treating only. These pleas, in substance, state that *Bass*, being possessed of a house, in which a boy was making a noise, the defendant, as his servant, in order to turn such boy out, gently laid his hands upon the plaintiff, and traversed the assault elsewhere than in the house. The plaintiff replied *de injuriâ sua propria*, and concluded to the country; on which the defendant joined issue.—The jury found a verdict for the plaintiff, damages one shilling.—Although both these pleas have been found against the defendant, and although he admitted in both of them, the laying of hands on the plaintiff, and in the latter, that he removed him from the house, still it has been insisted that he has not admitted by these pleas a

battery. In the introductory part of them, they differ from those other pleas which have been cited in prior cases, as they omit the beating, bruising, and wounding. These pleas must be construed strictly against the person pleading them. The defendant justifies not only the assaulting, but the ill-treating also. In the case of *Page v. Creed*, the plea of justification applied to the assault only, and the battery was not attempted to be justified. That case would be material, if it could be ascertained, whether the defendant pleaded *molliter manus*, as in this; but as the record cannot be found, it must be considered to have been a common plea, where the battery was not attempted to be justified. But the case of *Smith v. Edge* applies most strongly to the present; where, to an action of trespass for assaulting the plaintiff, and seizing, grasping him by the breast and shoulders, and dragging, pulling, and hauling him with great force; the defendant pleaded, *first*, the general issue; and, *secondly*, a justification, as to the assaulting, seizing, and grasping the plaintiff, and dragging, pulling, and hauling him about; that he gently laid his hands on the plaintiff, to remove him from a place in a parish church, where a vestry meeting was held, and that he gently removed him.—On a verdict being given for the plaintiff against these pleas, the question was, whether the defendant had admitted a battery by the latter; and although it was argued, that notwithstanding the introductory part of that plea, the justification itself was confined to ‘the ‘gently laying the defendant’s hands on the plaintiff to ‘remove him from the place, where, &c.’ and the conclusion also was, ‘which is the same trespass and assault,’ dropping the battery; and, therefore, that the battery was not justified, Lord *Kenyon* said, ‘The question is, ‘whether laying hold of the plaintiff, in a church, and ‘turning him out, were, or were not a battery;’ and

1817.

JOHNSON

v.

NORTHWOOD.



1817.  
  
 JOHNSON  
 v.  
 NORTHWOOD.

although the defendant there pleaded *molliter manus imposuit*, yet the removing him from the church was held to be a sufficient admission of a battery.—The declaration, in that case, states, that the defendant assaulted the plaintiff, and pulled him about with great force; and here it is merely stated, that the defendant committed an assault and battery on the plaintiff.—As the same objections might have been made in the case of *Smith v. Edge*, as have been raised here; and as that case must govern the present, we are of opinion that the plaintiff is entitled to his full costs; and that, therefore, the rule must be

Discharged.

Wednesday,  
 June 25th.

WEBB and YATES v. ASPINALL.

If a defendant on being arrested by a sheriff's officer, give a *cognovit* to the plaintiff, who was the attorney in the cause, without an attorney being present on his part, such *cognovit* is void, although the plaintiff swore he did not know the defendant was in custody, and although he was unattended by the officer.

MR. Serjt. *Best*, on a former day in this term, had obtained a rule *nisi*, that the *cognovit* given by the defendant, in this case, might be delivered up to be cancelled on an affidavit of the defendant, which stated, that in *April*, 1816, he was arrested by a sheriff's officer at the suit of the plaintiffs, under a *capias ad respondendum* for £15, and that on being so arrested, he was taken by the officer to the office of *Webb*, who was also the attorney in this cause, where he executed a *cognovit* for the debt and costs, amounting together to £25 : 5s., on which he was discharged out of custody, and that at the time he signed the *cognovit* there was no person present but *Webb*, or his clerk, and that no declaration had been

filed, nor special bail put in, nor had an appearance been entered; and that judgment had been signed on the *cognovit*, and a writ of *ca. sa.* duly issued thereon.

Mr. Serjt. *Vaughan* now shewed cause on an affidavit of *Webb*, which stated that he and *Yates* were trustees only, as to the debt, for the recovery of which this action was brought, and that they had no personal interest therein, and that when the defendant came to his office, in *April*, 1816, and signed the *cognovit*, he came there alone, and did not state to *Webb* that he was then in custody, and that the defendant signed the *cognovit* before he quitted the office; and that when he signed it he did not know that he was in custody, in this or in any other cause.

The learned serjeant contended that the defendant was not legally in custody at the time he signed the *cognovit*, for that the officer had been guilty of an escape in not having attended him to the office of *Webb*; and that as at all events there was a suspension of custody at the time such *cognovit* was given, it superseded the necessity of the presence of the defendant's attorney.

Lord Chief Justice GIBBS. Although a *cognovit* cannot in strictness be taken till after declaration, still, as it is the constant practice of this court to allow judgment to be entered up on a *cognovit*, on the supposition that a declaration has been either filed or delivered, we must decide in conformity to that practice. Still, however, it was necessary in this case, that the attorney for the defendant should have been present at the time the *cognovit* was given. *Webb* did not state in his affidavit, how the defendant came into his office, or by whom the application for the *cognovit* was made; but merely that he did not know that he was in custody when the *cognovit* was signed, but he had himself directed bailable process to be issued against the defendant, and directed the sheriff's officer to arrest him, in consequence of

1817.

WEBB  
v.

ASPINALL.

1817.

WEBB

v.

ASPINALL.

which the defendant came to his office, and gave a *cognovit* for the amount of the debt, and costs of the arrest. Could *Webb* therefore suppose that the officer had left the defendant at large? He must have known, not only that he had been arrested, but also that he was in the custody of the officer, although the latter was not present at the time of signing the *cognovit*. I, therefore, think that the defendant is entitled to the privilege given to a prisoner in actual custody, and as he had no attorney present on his part when he executed the *cognovit*, that it is void, and that this rule must consequently be made

Absolute, with costs.

Wednesday,  
June 25th.

HARTLEY v. HODSON.

If a defendant, in an action on a recognizance of bail, under a judge's order to plead issuably, plead, *first*, *nul tiel record*, and *secondly*, that no *ca. sa.* was sued out against the principal.—*Held*, that such pleas might be considered as issuable, and that the plaintiff could not sign judgment as for want of a plea.

THIS was an action on a recognizance of bail. The defendant had obtained an order for time to plead, pleading issuably, rejoining *gratis*, and taking short notice of trial. He afterwards pleaded, *first*, that there was no record of the recognizance, *secondly*, that after the judgment against the principal, the plaintiff sued out a *fi. fa.* directed to the bishop of *Durham*, to levy the damages recovered, whereby the sheriff levied such damages of his goods and chattels; and, *thirdly*, that there was no writ of *ca. sa.* sued out of this court against the principal upon the judgment, and duly returned in the court, as according to law, and the custom of this court, before the commencement of the suit there ought to have been. Upon which pleas the plaintiff signed judgment, as for want of a plea.

Mr. Serjt. *Hullock* on a former day, in this term, had obtained a rule *nisi*, that this judgment should be set aside for irregularity.

Mr. Serjt. *Blosset* now shewed cause on an affidavit, which stated that all these pleas were in fact false, and that neither of them could, therefore, be considered as issuable pleas. He referred to the cases of *Heron v. Heron* (a), *Lowfield v. Jackson* (b), and *Cave v. Aaron* (c). At all events, the first and third are merely sham pleas; and although the second might not, in strictness, be so, still the plaintiff was entitled to sign judgment. *Waterfall v. Glode* (d).

Mr. Serjt. *Hullock*, in support of the rule, insisted, that the first and third pleas were issuable, and referred to *Tidd's Practice* (e), to shew that on bail being perfected in this court, an entry should be made of the recognizance on a roll, which should be docketted and carried into the *Treasury-chamber*, and that this should regularly be done before any proceedings against the bail, or at least before they were called on to plead, for otherwise they might plead *nul tiel record*, and if the recognizance roll were not carried in till afterwards, it seems that they might withdraw their plea; and the plaintiff must pay the costs of it.

Lord Chief Justice GIBBS.—The question is, whether the first and third of these pleas were issuable. It is difficult to ascertain what pleas really are issuable.—Although sham pleas, upon the face of them, appear to be issuable, still they cannot be so considered. In a plea of judgment recovered, if there be no foundation for it, it cannot be an issuable plea, and although it might be a true plea, still, as it is so commonly pleaded, the plaintiff might sign

1817.  
HARTLEY  
v.  
HODSON.

---

(a) 1 Sir *W. Black.* 376.—(b) 2 *Wils.* 117.—(c) 3 *Wils.* 33.  
—(d) 3 *T. R.* 305.—(e) 1 Vol. 6th edit. 271.

1817.  
HARTLEY  
v.  
HODSON.

judgment. I remember, in the court of *King's Bench*, when a party was bound to plead issuably, and pleaded a false plea, and the plaintiff had signed judgment, that it was necessary for the defendant to support the truth of his plea by affidavit. Although, in principle, the first and third pleas are false, and I should have been strongly disposed to have treated them so, yet the officer of the court says, that by the practice, they may be considered as issuable pleas, and be admitted as such, under an order similar to the present.

*Per Curiam.*

Rule absolute, without costs.

END OF TRINITY TERM.

**C A S E S**  
**ARGUED AND DETERMINED**  
**IN THE**  
**Courts of Common Pleas**  
**AND**  
**Exchequer Chamber,**  
**IN**  
**MICHAELMAS TERM,**  
**IN THE**  
**FIFTY-EIGHTH YEAR OF THE REIGN OF GEORGE III.**

---

*Memorandum.*

Lord Chief Justice *Gibbs* was prevented from attending the Court, during the whole of this Term, by severe indisposition.

June 14th.

MITFORD v. ELLIOTT.

An estate, granted by the crown to a subject as tenant in tail for services, is not barred, so as to destroy the reversion of the crown; although two private acts of parliament may have been passed, confirming a settlement by the tenant in tail, purporting to pass such reversion, the crown being a party to neither of such acts, and each of them containing a saving clause, by which its rights were expressly reserved.—If a private act of parliament confirm a settlement of such estates made by the tenant in tail, and a subsequent act vest part of these estates in trustees for sale, with directions to purchase other lands with the produce of such sale, to be settled in lieu thereof, to the same uses as expressed in the preceding act.—*Held*, that the trustees had no power to convey the estates, so granted by the crown to a purchaser and his heirs in fee simple, and that the substitution of other lands did not destroy the reversionary interest of the crown in the estates originally granted.

A CASE, of which the following is the substance, was sent by the direction of the *Master of the Rolls*, for the opinion of the judges of this court.

King *Henry* the Eighth, being seized in his demesne in right of his crown in certain tenements, in consideration of the good and gratuitous services performed by Sir *Gilbert Talbot*, to him and his father, and to be performed thereafter: did, by a grant, duly made in the 4th year of his reign, give and grant to the said Sir *Gilbert Talbot*, his majesty's manor of *Birfield*, in the county of *Berks*; and all his majesty's lands, and tenements, rents, reversions, and services, with their appurtenances in *Birfield*, which were formerly the property of *John* Earl of *Lincoln*, and which came into the hands of his majesty's father, by reason of the forfeiture of the said Earl, and which were then in the hands of his majesty: To have and to hold to the said Sir *Gilbert Talbot*, and the heirs male of his body, lawfully begotten, of his said majesty and his heirs, by the service of fealty only:—By virtue of this grant, Sir *Gilbert Talbot* became and was seized of the said tenements in his demesne, as of fee tail to him and the heirs male of his body lawfully begotten, or to be begotten. After this grant, the tenements descended to, and legally vested in, *Charles* Earl and only Duke of *Sbrowsbury*, who, as heir male of the body of Sir *Gilbert Talbot*, became and was seized thereof in his demesne as of fee tail, descendable to the heirs male of the said Sir *Gilbert Talbot*.—The Duke of *Sbrowsbury* died without issue male, and after his

death, an act of parliament was passed, in the sixth year of the reign of his late majesty, King *George the First (a)*, entitled 'An act for annexing the late Duke of *Shrewsbury's* estate to the earldom of *Shrewsbury* and confirming ' *Gilbert* Earl of *Shrewsbury's* settlement in order thereto, ' and for other purposes therein mentioned.'—By this act, after reciting that the Duke of *Shrewsbury*, by indentures of lease and release, of the 30th and 31st of *October*, 1700, after failure of issue male of his body, and other uses then determined, settled all his manors, farms, lands, tenements and hereditaments whatsoever, situate in the several counties of *Salop, Worcester, BERKS, Chester, Stafford, Oxford, Wilts* and *Derby*, to the use of *George Talbot*, the third son of *Gilbert Talbot* (uncle of the said Duke of *Shrewsbury*) for his life; remainder to the first, and other sons of the said *George Talbot*, successively in tail male, and for want of such issue, to the use of *John Talbot*, (eldest son and heir of *Thomas Talbot*, then deceased), for life; remainder to the first and other sons of the said *John Talbot*, successively in tail male, and for want of such issue, to the use of Sir *John Talbot* for life, with remainder to his first and other sons, successively in tail male, and for want of such issue, to the use of the said Duke of *Shrewsbury*, his heirs and assigns for ever; and also, reciting that the said Duke of *Shrewsbury*, by his will of the 19th of *July*, 1712, confirmed such settlement: and further reciting in the said act, that the said Duke of *Shrewsbury* died on the 1st of *February*, 1717, without leaving any issue, whereby his title, and the reversion and inheritance of the said manors, &c. so settled, came to the Right Honourable *Gilbert*, then Earl of *Shrewsbury*, eldest son and heir of the said *Gilbert Talbot* (uncle of the said duke); and further reciting that the said *Gilbert* Earl of *Shrews-*

1817.

MITFORD  
v.  
ELLIOTT.



1817.  
  
 MITFORD  
 v.  
 ELLIOTT.

*bury*, being resolved not to marry, by indentures of lease and release, dated the 3d and 4th of *March*, 1718, made in contemplation of a marriage then intended between the said *George Talbot*, younger brother of the said *Gilbert Talbot*, and the Honourable *Mary Fitzwilliam*; and in consideration of £13,000 portion, the said *Gilbert* Earl of *Shrewsbury*, *George* Earl of *Cardigan*, *William*, Lord Bishop of *Salisbury*, and Sir *John Stanley*, (parties to the said indenture of release) according to their respective estates and interest, granted and conveyed unto the Right Honourable *Richard* Lord *Lumley*, and *Nevill Ridley*, (also parties to the said indenture of release) and to their heirs, (among other manors, lands, and hereditaments), all and every the said manors, farms, lands, tenements, and hereditaments whatsoever; situate in the several counties of *Salop*, *Worcester*, *BERKS*, *Chester*, *Stafford*, *Oxford*, and *Wilts*, (except as therein mentioned), to hold (except as therein excepted) to the said *Richard* Lord *Lumley*, and *Nevill Ridley*, and their heirs, as for and concerning the said manors, lands, tenements, and hereditaments, in the said counties of *Salop*, *Worcester*, and *BERKS*, to the use of *Richard* Lord Viscount *Fitzwilliam*, and *George Pitt*, (also parties to the said indenture of release), their executors, administrators, and assigns, for ninety-nine years, if the said *George Talbot* and *Mary Fitzwilliam* should jointly so long live: upon trust for raising the annual sum of £400 for the said *Mary* during her life, and to permit the said *George Talbot* to receive the residue of the profits for his life.—And as for and concerning the said hereditaments, and all other the said manors, lands, tenements, hereditaments, and premises, bargained and sold by the said indenture, (except as aforesaid,) to the use of the said *George Talbot*, for life, and after his decease, to the intent that the said *Mary Fitzwilliam* should receive thereout the annual sum of

£1500, for her life, and charged therewith to the use of the said *Richard* Lord Viscount *Fitzwilliam*, and *George Pitt*, their executors, administrators, and assigns, for two hundred years, and after the determination thereof, to the use of the first and other sons of the said *George Talbot*, on the body of the said *Mary Fitzwilliam* to be begotten in tail male successively; and for want of such issue to the use of the said *Richard* Lord Viscount *Fitzwilliam*, Sir *John Webb*, and *George Pitt*, their executors, administrators and assigns, for five hundred years, (which term was then determined) upon trust for raising £20,000, and maintenance for the daughters of the said *George Talbot* and *Mary Fitzwilliam*, in case they should have no issue male; and after the determination of the said term of five hundred years, to the use of the first, and all other sons of the said *George Talbot*, on the body of any after taken wife to be begotten, in tail male successively; and for want of such issue, to the use of *John Talbot*, esquire, (eldest son and heir of *Thomas Talbot*, esquire, then late of *Langford*, in the county of *Salop*, deceased,) for his life, remainder to the first, and other sons of the said *John Talbot*, in tail male successively. And also, reciting in the indenture of release, of the 4th of *March*, 1718, that after the deaths of *Gilbert* Earl of *Shrewsbury*, *George Talbot* and *John Talbot*, and failure of issue male of their respective bodies, the title of Earl of *Shrewsbury* would, by course of descent, come to *William* Lord Bishop of *Salisbury*, and that application should be made for obtaining a private act of parliament for settling the said manors, lands, and hereditaments, on the said *William* Lord Bishop of *Salisbury*, and the issue male of his body, in such manner as should be advised. And further reciting in the said act, that the said *Gilbert* Earl of *Shrewsbury* was desirous that the said manors, lands, tenements, and hereditaments, should be annexed to the said title

1817.

MITFORD  
v.  
ELLIOTT.

1817.  
 MITFORD  
 v.  
 ELLIOTT.

and dignity of Earl of *Shrewsbury*, for the better support thereof: It was at the petition of the said *Gilbert Earl of Shrewsbury, George Talbot, John Talbot, William Talbot*, Lord Bishop of *Salisbury*, and *Charles Talbot*, (son and heir of the said Bishop of *Salisbury*,) *Edward Charington*, and *Henry Talbot*, (younger sons of the said Bishop of *Salisbury*) enacted that the said indentures of the 3d and 4th of *March*, 1713, should be ratified and confirmed. Provided that neither the first nor any other of the son or sons of the said *George Talbot*, or *John Talbot*, or *Gilbert Earl of Shrewsbury*, nor any of the heirs male of the body or bodies of any such son or sons issuing, nor any other person or persons, his or their heirs male, of his or their body or bodies issuing, to whom any estate of inheritance in the premises should thereafter descend or accrue by means of that act who should within six months after attaining the age of eighteen years, take the oaths, &c. therein mentioned, (and continue a protestant until the age of twenty-one,) should, after that age, and continuing protestants, be disabled from aliening, giving, granting, bargaining, selling, or otherwise conveying, the said manors, messuages, lands, tenements, or hereditaments, thereby settled; but might alien, give, grant, bargain, sell, or otherwise convey the same as freely and absolutely as he or they might have done if such act had not been made.

And in the said act is also contained a saving clause, in the words following:—‘Saving also, and reserving to  
 ‘our sovereign lord the king, his heirs and successors, and  
 ‘to all and every person and persons, bodies politic and  
 ‘corporate, their heirs, successors, administrators, and  
 ‘assigns, (other than and except the said *Gilbert Earl of*  
 ‘*Shrewsbury*, and his heirs and assigns, the said *George*  
 ‘*Talbot*, brother of the said Earl of *Shrewsbury*, and the  
 ‘issue male of his body,) all such right, title, claim, or

‘ demand, whatsoever, as they every or any of them might,  
 ‘ could, or ought to have had, claimed, held, or enjoyed,  
 ‘ in case this act had not been made, any thing herein-  
 ‘ before contained to the contrary notwithstanding.’

1817.  
 ~~~~~  
 MITFORD  
 v.  
 ELLIOTT.

Another act of parliament was passed in the forty-third year of the reign of his present majesty, entitled, “ An act for vesting part of the settled estates of the Earl of *Shrewsbury*, in the counties of *Salop*, *Worcester*, *Chester*, *Berks*, *Wilts*, and *Oxford*, in trustees, to be sold, and for laying out the monies to arise by such sale in the purchase of other lands, to be settled in lieu thereof, to the same uses, and subject to the same restrictions as limited and declared in the preceding statute;” whereby, after reciting the said last mentioned act, and reciting that the Right Honourable *Charles*, then Earl of *Shrewsbury*, was the heir male of the said *George Talbot*, and *Mary* his wife, (his late grandfather and grandmother), and was entitled to an estate in tail male, in possession of the said settled manors and estates, subject to the restrictions imposed by the 6th of *Geo. 1.*; and that on the decease of the said *Charles*, Earl of *Shrewsbury*, without issue male, the title and dignity of the Earl of *Shrewsbury*, and the manors, lands, and hereditaments, would, under the limitations of the indenture of the 4th of *March*, 1718, descend to the Honourable *John Joseph Talbot*, his brother, and his issue male; and reciting that parts of such estates consisted of undivided shares, and others were dispersed and lay in places distant from each other, in the several counties of *Salop*, *Chester*, *Berks*, *Wilts*, and *Oxford*; and that it would be for the benefit of the said earl and those entitled in remainder, if all the said estates were sold; and that it was desirable to purchase other estates in the counties of *Oxford*, *Worcester*, *Stafford*, and *Chester*, and that it would be advantageous that powers should be

1817.  
 MITFORD  
 v.  
 ELLIOTT.

given to sell all the said estates in *Salop, Chester, BERKS, Wilts, and Oxford*, and to lay out the monies arising therefrom in the purchase of other estates in *Oxford, Worcester, Stafford, and Chester*, to be settled as nearly as might be, to the same uses, as by the said settlement and recited act were directed and limited, of the estates thereby settled: it was enacted, on the petition of the said *Charles, Earl of Shrewsbury*, and *John Joseph Talbot*, That all the manors, messuages, farms, lands, hereditaments, and premises, and undivided parts and shares thereof, in the several counties of *Salop, Chester, BERKS, Wilts, and Oxford*, limited and settled by the indentures of the 3d and 4th of *March*, 1718, with all the appurtenances, should from the passing of that act, be vested in, and settled upon *Thomas Wright* and *Charles Conolly* (therein described) and their heirs, to the use of them, their heirs and assigns for ever; released and discharged, and absolutely acquitted, exempted, and exonerated of and from all and every the uses, trusts, estates, entails, remainders, charges, powers, provisoes, limitations, and agreements in the indentures, of the 30th and 31st of *October*, 1700; the said *Duke of Shrewsbury's* will, and the said indentures of the 3d and 4th of *March*, 1718, and the said recited act, respectively created, limited, provided, and declared, concerning the same, upon trust, that the said *Thomas Wright*, and *Charles Conolly*, and the survivor of them, and his heirs and assigns, should, with the consent of the said *Charles Earl of Shrewsbury*, to be certified by writing under his hand, and after his decease, with the consent of the person or persons, who should be in the possession of the said estates respectively, to be testified as aforesaid, sell and dispose of all and singular the said manors, messuages, farms, lands, hereditaments, and premises, and parts and shares thereof, with their appurtenances, either together, or in parcels, or by public sale, or private con-

" tract, unto such person or persons as should be willing to become the purchaser or purchasers thereof; and on payment of the purchase money into the Bank, should convey and assure the said hereditaments respectively unto the purchaser or purchasers thereof, and his and their heirs and assigns respectively, or as he or they should direct or appoint, freed and discharged, and acquitted, exempted, and exonerated as aforesaid.—And it was further enacted, that after payment of the expences therein mentioned, all the residue of the monies, arising by the sale, should be laid out and invested by the said *Thomas Wright*, and *Charles Conolly*, or the survivor of them, or the heirs of such survivor by the direction of the said court of *Chancery*, and with the consent of the said *Charles Earl of Sbrewsbury*, and after his decease, by such consent as aforesaid, in the purchase of freehold manors, messuages, farms, lands, tenements, or hereditaments, of a clear and indefeazable estate of inheritance in fee simple, in possession, and such copyhold lands as should happen to be intermixed, not exceeding in value one sixth-part of the freehold premises so to be purchased, situate in the counties of *Oxford*, *Worcester*, *Stafford* and *Chester*, or other neighbouring counties in *England*; and that the land so to be purchased, should be conveyed, settled, limited, and assured, to such uses, and be subject to such powers, provisoes, conditions, limitations, restrictions from alienation, declarations, and agreements, as the aforesaid manors, lands, and hereditaments, in the said settlement and act mentioned, then stood settled and limited, or to such of them, as should be then undetermined, and capable of taking effect, or as near thereto as the estates so to be purchased would admit.

1817.  
 MITFORD  
 v.  
 ELLIOTT.

In the said last mentioned act is also contained the following saving clause to the crown:—'Saving always to the

1817.  
 ~~~~~  
 MITFORD  
 v.  
 ELLIOTT.

‘ king’s most excellent majesty, his heirs and successors,  
 ‘ and to all and every other person and persons, bodies  
 ‘ politic and corporate, his, her, and their respective heirs,  
 ‘ successors, executors, and administrators, other than and  
 ‘ except the said *Charles Earl of Sbrewsbury*, and his heirs  
 ‘ male, and the said *John Joseph Talbot*, and his heirs  
 ‘ male, and also all and every other person or persons  
 ‘ claiming or to claim any estate, right, title, interest, in-  
 ‘ heritance, use, trust, claim, or demand whatsoever, in,  
 ‘ or out of the several premises, hereby respectively made  
 ‘ saleable as aforesaid, or any part thereof, under or by  
 ‘ virtue of the said several indentures of settlement or  
 ‘ either of them, or the said act of parliament of the  
 ‘ sixth year of the reign of his late majesty king *George*  
 ‘ the First, or any of them, all such estates, right, title,  
 ‘ interest, claim, and demand whatsoever, of, in, to, or  
 ‘ out of the said premises, every or any part thereof, as  
 ‘ they, every, or any of them had, before the passing of  
 ‘ this act, or could, should, or might have had or enjoyed  
 ‘ in case this act had not been made.’

After passing the last recited act; indentures of lease and release were made dated the 25th and 26th of *July*, 1814, the release between the said *Thomas Wright*, and *Charles Conolly*, of the first part, *Charles*, Earl of *Sbrewsbury*, of the second part, *Henry Robins*, *John Robins*, and *George Henry Robins*, of the third part, *George Mitford* (the plaintiff) of the fourth part, and *William Stokes* of the fifth part,—reciting that the said *Thomas Wright*, and *Charles Conolly*, had, with the consent of the said *Charles Earl of Sbrewsbury*, testified as therein mentioned, contracted and agreed with the said *George Mitford*, for the sale of the several pieces or parcels of land, called *Heath’s land*, situate in the parish of *Shinfield*, in the county of *Berks*, (being part and parcel of the said

hereditaments) which were vested in the said *Thomas Wright* and *Charles Conolly*, their heirs and assigns, by the said recited act of parliament, for the sum of £1257 : 18s., including the timber growing thereon; and that the said *George Mitford* had paid this sum into the Bank of *England*, in the name of the accountant-general of the court of *Chancery*, and that the same had been placed according to the directions of the said last mentioned act.—It was witnessed, that the said *Thomas Wright*, and *Charles Conolly*, with the consent of the said *Charles*, Earl of *Shrewsbury*, and at the request and by the direction and appointment of the said *George Mitford*, did, according to their estate and interest therein, grant, bargain, sell, dispose of, alien and release unto the said *George Mitford*, his heirs and assigns, in his actual possession, &c. the said parcels of land, called *Heath's land*, &c. to hold the same unto, and to the use of the said *George Mitford*, his heirs and assigns for ever.

1817.  
  
 MITFORD  
 v.  
 ELLIOTT.

The said parcels of land, called *Heath's land*, are part and parcel of the hereditaments and premises, granted to the said Sir *Gilbert Talbot*, and the heirs male of his body, by the grant of his majesty, king *Henry* the Eighth. At the time of passing the act of the forty-third of his present majesty, issue male of the body of the said Sir *Gilbert Talbot* was in being.

The question for the opinion of the court was, whether the said *George Mitford* (the plaintiff) was seized in fee simple of the premises, called *Heath's land*, mentioned in the said indenture of release of the 26th of *July*, 1814.

Mr. Serjt. *Pell*, for the plaintiff.—The question is, whether the estate tail, created by the crown, in consideration of services, can be barred, and the reversion of the crown destroyed. It is quite clear, that an estate tail, granted by the crown for services performed by



1817.  
  
 MITFORD  
 v.  
 ELLIOTT.

the subject, cannot be barred by common recovery. It is equally clear, that if an estate tail exist in any property where the reversionary right remains in the crown, and not granted for services of the subject, that it is barrable by recovery; otherwise a perpetuity might be created, by giving to the crown a reversionary right. He referred to *Dyer's Reports* (a), *Wiseman's case* (b), and *Cholmley's case* (c). This case resolves itself into two points; *first*, Whether the issue in tail, of Sir *Gilbert Talbot*, are barred by the statutes of the 6 Geo. 1, and 43 Geo. 3; and *secondly*, supposing such issue to be barred, whether the interest of the crown be outstanding in the reversionary right, and not affected by those acts of parliament. This must depend on the saving clauses in such acts. It is an established rule of law, that a saving clause repugnant to the body of an act of parliament is void, as if no such clause had been introduced. In construing estate acts, the intentions of the parties concerned must be considered in the same light as if they had been parties to a deed. In the case of *Westby v. Kiernan* (d), where a tenant in tail, with remainders over, was enabled by a private act of parliament to pay debts, and charge the estate with a sum of money; but the saving clause did not except the rights of the remainder man, yet he was held to be barred: the case would have been otherwise, had he been tenant for life only. The same doctrine is laid down in *Booth's Cases and Opinions* (e), where it was established that an estate tail, and all the remainders, and the reversion depending on it, might be barred by a private act of parliament, although the persons in remainder and reversion did not consent thereto. Even, if all the rights of Sir *Gilbert Talbot* were not barred by these statutes, still, not only by the general principles

---

(a) 32 (a).—(b) 2 *Coke's Rep.* 15.—(c) *Id.* 50.—(d) *Ambler*, 697.—(e) 2 vol. 400.

of law, but also by the saving clauses being repugnant to the body of the acts, (and therefore void), the crown would be completely barred. It was the intent of the legislature, as well as the only object of the act of the 43 Geo. 3, to grant to trustees a power of selling the estates, and destroy the reversionary right of the crown. In order to shew that saving clauses repugnant to the body of the acts were void, he cited *Alton Wood's case* (a), *Wood v. Cecil* (b), and *Riddle v. White* (c). If by the 6 Geo. 1, and 43 Geo. 3, the whole property passed, still, by the latter statute, the lands to be purchased by trustees, were to be settled to the same uses as those granted to Sir Gilbert Talbot, by the grant of Henry the Eighth. The substitution of such lands therefore took place subject to all the rights of the original estate. What injury therefore could the crown receive, which had not the original estate granted, but one of equal value in lieu thereof? No right can arise to the crown by the saving clauses against the conveyance of the property, as the legislature used every precaution in framing those acts. The right of the tenant in tail, therefore being still in existence, the reversionary right of the crown is barred by these statutes; notwithstanding the introduction of the saving clauses, for another estate has by the latter statute been substituted, subject to all the rights of the original one, and the trustees had a right to convey to the plaintiff, who has therefore an estate in fee.

Mr. Serjt. *Blosset*, for the defendant, premised, that in the case of a common person, if there were a reversion after an estate in tail, it might be barred; but, as in this case the reversion remained in the crown, it could not be barred by a common recovery. Here, the crown is not affected by these statutes, and not being named in

1817.,  
MITFORD  
v.  
ELLIOTT.

---

(a) 1 Coke's Rep. 47.—(b) 2 Vern. 711.—(c) 4 Gwillim, 1387.

1817.  
 ~~~~~  
 MITFORD  
 v.  
 LLIOTT.

the enacting part of them, must be considered as a total stranger, whose rights are saved by virtue of the royal prerogative. Without the saving clauses, private acts of parliament will not bind the rights of strangers, unless they be therein specifically named. Thus, in *Barington's* case (a), where the question was on the construction of the 22nd of *Edw. 4, c. 7*, Lord *Coke* reports this as one of the reasons, upon which the judges determined that commoners were not bound by that statute, namely; 'It appears by the preamble, between whom, and for and against whom that act was made.' The same reason was urged in *Alton Wood's* case, where *Walshe* had an estate tail in the manor of *Abbotlesley*, and by the act of the 28 *Henry 8*, it was granted by name, expressly to the king, saving the rights of all persons as if the act had not passed. The Lord Keeper held, that this saving did not extend to *Walshe*, for he (admitting the estate tail to be good) was the donor, and then the saving could not extend to him; *à fortiori*, therefore, the saving clauses, in this case, must take effect, as the rights of the parties are saved, although they are not expressly named in these acts. Although a saving clause, repugnant to the body of an act of parliament, be void, still here it cannot assist the plaintiff, for in the authority cited in support of that doctrine, the right arose from the estate tail, out of which it was originally derived, being determined by an attainder, and the proposition was, that where an estate is at an end, all particular estates, or things derived from it, were also at an end; for when an estate no longer exists, nothing can be saved out of it, for it is impossible that any thing can be saved from that which is not (b).—The cases in *Dyer* (c), and *Brooke's Parliamentary Cases* (d),

---

(a) 8 *Coke's Rep.* 136.—(b) *Walsingham's Case, Plowden's Comm.* 565.—(c) 231.—(d) 77, cited 1 *Coke's Rep.* 47, a.

were stated by counsel, in *Riddle v. White* (a), to be inaccurate, inasmuch as neither of them had been decided on the ground that the saving clause was repugnant to the body of the act. The case in *Dyer* was decided on the principle, that the saving could not be understood of future titles, and in *Brooke* it was held, that saving clauses would only save that which was in *esse* at the time of the saving, and would not revive services, &c. extinguished by a forfeiture, committed long before the passing of the act. As the case of *Alton Wood* has not been decided, the proposition laid down in *Plowden* shews the contrary principle; and where the right is such as might have been barred by a common recovery, a general saving clause cannot avail. A private statute operates as a common recovery, and will bar an estate tail, and all remainders expectant thereon, and also the reversion, although the rights of the remainder men were not excepted in the saving. In the case of the Provost of *Eton v. The Bishop of Winchester* (b), the rectory of *Overblowes* was vested in the crown for ever by a private act of *William and Mary*, with a saving of the rights of all persons, other than the crown, the Duke and Duchess of *Somerset* and their heirs, to the advowson or any or either of them, and it appeared that the Duke of *Somerset* had only an estate for life, and a remainder over to Lord *Egremont*; it was held, that upon the death of the Duke of *Somerset*, the advowson vested in Lord *Egremont*, because he was included within the general saving of the act. This appears in the case of *Westby v. Kiernan*, and the distinction there adverted to, by Lord Chancellor *Apsley*, between a tenant in tail and a tenant for life, is applicable to this case; for the crown here having the reversion in fee, stands as an individual, who might have

1817.  
MITFORD  
v.  
FLOITT.

---

(a) 4 *Guill.* 1394. — (b) 3 *Wils.* 483.

1817.

MITFORD

v.

ELLIOTT.

a reversion in fee, after an estate for life had been determined, and which could not be barred by a common recovery. Though a recovery suffered by a tenant in tail, bar an estate tail, yet it will not affect any interest which the crown may have in the remainder or reversion (a). As, therefore, the crown cannot be barred by fine or recovery, so the reversion cannot be barred by a private act of parliament, to which the crown is not a party. This was a grant for services, and there was therefore a reversionary interest in the crown, which could not be barred.—With respect to the repugnancy, is not a mere inconsistency, which will make such a clause void (for every saving clause is somewhat repugnant to a general enactment), but an express and apparent contradiction. In the case of the Provost of *Eton* v. the Bishop of *Winchester*, there was not only a repugnancy, but an inconsistency, as the statute there could not operate as a deed of exchange, because the word exchange was not mentioned in it. Here, the crown is no party to either of the acts, and its rights have never been brought before the legislature. A saving clause implies a saving of something which would otherwise be destroyed, or it would be totally nugatory. So, in *Riddle v. White*, there was an express contradiction, for it was there held that the saving clause, at the end of an enclosure act, reserving the rights of all persons, not parties thereto, did not save the rights of a rector, who was not a party to the act, where the enacting clause in the statute expressly exonerated the lands from tithes. The case of *Wood v. Cecil* illustrates the distinction, that a general saving clause in a private act will not control the provisions contained in the body, but must be so expounded as to be rendered consistent therewith. Although, in this case, it may be contended, that there

---

(a) *Plowden's Comm.* 553.

is a great inconsistency, still if there was such repugnancy, or apparent contradiction between the saving clauses and the body of the acts as to make the former nugatory, all that can be said against it is, that it is a defective title, occasioned by the framers of the acts, for in the 43 *Geo.* 3, they have not provided for the extinguishment of the right of the crown, nor is any mention made of such right; neither is there any direction to settle the new estate to the crown in ultimate reversion, to the same uses which were created in the 6 *Geo.* 1.—Even if a common person would be barred, yet the crown cannot be, by reason of its prerogative, for if the king be not expressly named in an act of parliament, he cannot be restrained of a right which he had before (*a*), and it might be questioned if he would be barred here independently of the clauses which save his rights, and as the crown cannot be barred by the statutes of bankruptcy, or limitations, there can be no pretence for saying that it is barred by a private act of parliament, where its rights are expressly saved.

Mr. Serjt. *Pell*, in reply, admitted, that although strangers were not barred by a private statute, still, here the crown could not be considered as a mere stranger, for the issue in tail and the crown were the only parties to it, and such issue were bound by the statutes. The 6 *Geo.* 1., was passed on the petition of *Gilbert Earl of Shrewsbury* and the issue in tail, who represented those in whom the estate subsequently vested. *Alton Wood's* case has been always acted upon, to shew that if a saving clause be repugnant to the body of an act, it is void. He referred to the opinion of the Lord Keeper (*b*), and observed that there were many other

1817.

MITFORD  
v.  
ELLIOTT.

(*a*) *Plowden's Comm.* 240. *Com. Dig.* tit. *Parliament.* R. 8.  
—(*b*) 1 *Coke's Rep.* 52, b.

1817.  
  
 MITFORD  
 v.  
 ELLIOTT.

cases in which such clauses had been considered void.— Lord Chief Baron *Eyre*, in *Riddle v. White*, refers in his judgment to *Alton Wood's* case; and in the case of *Wood v. Cecil*, the Lord Chancellor drew the distinction between the remedy in law and in equity. The Provost of *Eton* v. the Bishop of *Winchester*, does not bear out the proposition contended for, as there the tenancy was for life. He insisted that the rights of the crown must have been discussed, because the grant from *Henry* the Eighth must have been adverted to, in making out the title in tail in the Earl of *Shrewsbury*, and although such interest has not been alluded to in the acts, still the interest of the crown must have been considered prior to their being passed. [Lord Chief Justice *Gibbs*.—Did the *Attorney-General*, in the 43 *Geo.* 3, assent on behalf of the crown?] It must be inferred that he did, because the tenant in tail must have appeared before the houses of parliament, before a consent for passing the acts could be obtained. The *Attorney-General* either did or did not appear;—if he did, the objection would be cured. If he did not appear, it must be considered that the committee thought the consent unnecessary. But, at all events, this is cured by the substituted lands being declared as settled to the same uses as were expressed in the 6 *Geo.* 1. The question is, whether the right of the crown is saved by the 6 *Geo.* 1; if so, such right is kept alive as far as that statute extends; and then, whether under the 43 *Geo.* 3, the substituted lands are subject to the reversion in the crown.

Lord Chief Justice *GIBBS*.—The only point is, whether there be a reversion in the crown. Neither of the acts have referred to the interest of the crown; but a strong presumption may be collected from a few passages, that it had a reversionary interest.

The following certificate was afterwards sent to the *Master of the Rolls*.

1817.  
MITFORD  
v.  
ELLIOTT.

We have heard this case argued;—we have considered it, and are of opinion that the said *George Mitford* is not seized in absolute fee simple of the said premises, called *Heath's land*, mentioned in the said indenture of release, of the 26th of *July*, 1814 (a).

V. GIBBS.  
J. A. PARK.  
J. BURROUGH.

---

(a) All the decisions applicable to this case are collected in *Cruise's Digest*, vol. 4,—518 to 544.

---

KEY, and others, assignees of ROBINSON and another v.  
FLINT.

Friday,  
Nov. 7th.

THIS was an action of trover, brought by the plaintiffs, as assignees of *George* and *Samuel Robinson*, to recover from the defendant a bill of exchange for £650, dated the 15th of *May*, 1816, drawn by *Geraldes & Co.* upon, and accepted by *Samuel Jackson*, payable six months after date. The declaration contained two counts, the one on the possession of the bill by the bankrupts before, and the other by the plaintiffs as assignees after the bankruptcy;—the defendant pleaded not guilty. The cause was tried before Mr. Justice *Dallas*, at *Guildhall*, at the If a person, previous to his bankruptcy, deposit a bill of exchange with a defendant for the purpose of raising money thereon, and an advance is accordingly made.—*Held*, that the assignees of such bankrupt were entitled to recover the bill in an action of trover, on having tendered the money advanced, although a balance remained due from the bankrupt to the defendant, on a general account; and that this, therefore, was not a case of mutual trust or credit, within the statute 5 Geo. 2, c. 30, s. 28.



1817.  
 ~~~~~  
 KEY  
 v.  
 FLINT.

sittings after the last term, when the plaintiffs, having proved the petitioning creditor's debt, and the act of bankruptcy, *George Robinson* (having obtained his certificate), admitted that *Samuel Robinson* and himself were indebted to the defendant, *prior* to their bankruptcy, in a considerable sum of money; but that the bill in question was not given by them to the defendant in satisfaction of their debt, but was merely deposited with him for the purpose of his raising money on it. That the defendant, at the time the bill was deposited, refused to discount it, but advanced the sum of £39 in bank notes, and a check; and on a subsequent day accepted a bill of the bankrupts for £116, which he afterwards paid. The plaintiffs, previously to the commencement of this action, demanded the bill from the defendant, and tendered him £155, being the amount he had advanced upon it. On this evidence, the learned judge directed the jury to find a verdict for the plaintiffs; but reserved the point, whether the assignees had a right to recover the bill from the defendant, without paying him the general balance due from the bankrupts, or whether this was a case of mutual credit, and capable of being set off by virtue of the statute of 5 *Geo. 2*, c. 30, sect. 28 (a), on the ground that the bill having been deposited with the defendant before the bankruptcy, on account of advances made by him, could be retained for the monies due to him from the bankrupts on the general account.

Mr. Serjt. *Best* now moved that this verdict should be set aside, and a non-suit entered, or a new trial granted.

---

(a) Which enacts, 'That where it shall appear to the commissioners, that there has been mutual credit, or mutual debts between the bankrupt and any other person, before the bankruptcy, the commissioners or assignees shall state the account between them, and one debt may be set against another, and the balance only of such account shall be paid on either side.'

He submitted, that although the bill was deposited with the defendant, for the specific purpose, as stated by one of the bankrupts, still that the plaintiffs were not entitled to recover it back, until the whole amount of his demands against the bankrupts had been satisfied. At all events, if the defendant had not a lien on the bill for the general balance, yet, this was a case of mutual credit, and came strictly within the meaning of the statute of 5 Geo. 2, c. 30. He cited the cases of *Ex parte Deeze* (a), and *Atkinson v. Elliott* (b), and observed, that no subsequent decisions had narrowed the doctrine laid down in the latter case, by Mr. Justice *Grose* and Mr. Justice *Lawrence*. That the case of *Staniforth v. Fellowes* (c), was not decided on this point, as it there appeared, in the course of the argument, that one of the partners had not been made a bankrupt, and the court gave their judgment on that ground only. He also relied on the case of *Smith v. Hodson* (d), as being expressly in point.—[Mr. Justice *Dallas*.—These latter cases are collected in that of *Olive v. Smith* (e).] Although *assumpsit* has been the form of action in the cases cited, still it is not material, because where there has been a bankruptcy, the parties have a better opportunity of setting off mutual debts in trover, than in *assumpsit*. In *Ex parte Deeze*, where a packer had received goods from a man, who afterwards became bankrupt, for the purpose of packing them, it was insisted that when he had been paid for such packing, he was bound to return the goods; but the court held, that he was entitled to retain them, until not only the price of packing, but also all other debts due to him from the bankrupt were satisfied. So, in this case, the bill was deposited by the bankrupts for the purpose of the de-

1817.  
 ~~~~~  
 KEY  
 v.  
 FLINT.

---

(a) 1 Atk. 228.—(b) 7 T. R. 378.—(c) 1 Marsh. 184.—  
 (d) 4 T. R. 211.—(e) 5 Taunt. 56.

1817.  
 ~~~~~  
 KEY  
 v.  
 FLINT.

fendant's raising money thereon. He was therefore bound to return the bill, if he had made no advances on it; but having so done, he was entitled to retain it, until the bankrupts had satisfied the amount of the debts which were due to him. If this were not the case, it would counteract the beneficial effects of the statute of 5 Geo. 2, for the commissioners are not to look to one single transaction, but to consider the whole of the accounts between the parties, and find what debts may be due on either side. The statute, in terms, does not require a bill of exchange deposited by a bankrupt for advances to be made on it, to be given up until the whole of the debts be satisfied. As, therefore, no decisions have infringed on the cases of *Ex parte Dene*, and *Atkinson v. Elliott*, he insisted that this case came within the statute, and that the plaintiffs could not be entitled to the bill, until the general balance due from the bankrupts to the defendant had been discharged.

Mr. Justice DALLAS.—This cannot be considered a case of mutual credit, for by mutual credit a reciprocity of trust must be inferred;—neither can this be a trust to constitute a mutual credit; for, on the contrary, it appears to be a gross breach of trust. Although the bankrupts might be considerably indebted to the defendant, on a balance of accounts between them, still the bill of exchange, which forms the subject of the present action, was deposited with him for a specific purpose, and not intended to have reference to the general account. It is necessary to report the evidence of the bankrupt, who was examined at the trial. in order to shew the real circumstances under which the bill was left in the hands of the defendant. He stated that he received the bill from a person by the name of *Carlos*, for which he gave two notes, drawn by himself and his partner;—that having obtained this bill, he applied to the de-

fendant, either to discount, or advance money on it;—that he called repeatedly on the defendant, who although he acknowledged the bill to be good, advanced only £155; but promised to make further advances on it, which he had not performed;—that the bill was not left on the general account, but for the express purpose of having money advanced;—that on an application for the bill, *prior* to the bankruptcy, the defendant said he had parted with it, on having raised 3 or £400 upon it;—that the bankrupts had given him no authority to pledge the bill, but that he held it only as a security for the sums which he had advanced. On these facts, I directed the jury to find a verdict for the plaintiffs, and I now think that the doctrine contended for, by my brother *Best*, would tend to destroy the beneficial effects of the statute.

Mr. Justice PARK.—I can see no reason to disturb the verdict of the jury.

Mr. Justice BURROUGH.—I am entirely of the same opinion.—The assignees having tendered the amount of the sums advanced by the defendant, were entitled to recover the possession of the bill.

Rule refused.

1817.

Key

Flint.

Flint.

HINDLE v. BIRCH, and another.

Saturday,  
Nov. 8th.

THIS was an action against the sheriff of *Middlesex*, for taking insufficient sureties on a replevin bond.—At the trial before Mr. Justice *Park*, at the sittings at *Westminster*, after the last term, in order to shew the insufficiency of one of the sureties, the plaintiff adduced evidence to prove

An affidavit, tending to impeach a verdict, though the misconduct of one of the jurors, cannot be received after trial.

1817.  
  
 HINDLE  
 v.  
 BIRCH.

that he had been frequently arrested; but it was admitted that he had always paid the debt and costs, without being imprisoned. On the part of the defendant it was shewn, that a respectable builder had lately furnished such surety with £600, to relieve his difficulties, and supplied him with goods to the amount of £2000.—The learned judge left it to the jury to determine whether the surety was sufficient, at the time the bond was entered into, and stated on the authority of *Hindle v. Blades* (a), that if he was apparently responsible, it was sufficient. The jury, however, found a verdict for the plaintiff.

Mr. Serjt. *Vaughan* now moved to set it aside, and have a new trial, on two grounds; *first*, that the verdict was against evidence;—and *secondly*, on an affidavit of a sheriff's officer by the name of *Radford*, which stated, that one of the jurors after trial had said to him, 'There was one of your brother officers got served out the other day, in a replevin cause of *Hindle's*,—I was on the jury;—he played me a dirty trick once, and I was determined to give him a lift when it laid in my power.' He cited the case of *Vasie v. Delaval* (b), to shew that the affidavit of a juror could not be received; but that the information must come from some other source. The weight of evidence being in favour of the defendant, and the verdict being impeached by this conversation of one of the jurors, he insisted that this was a fit ground for a second inquiry.

Mr. Justice DALLAS.—On the *first* point it cannot be contended, for a moment, that there is any ground for this application; it was a mere question of fact for the jury to determine, which has been set at rest by their verdict. *Secondly*, it has been insisted that the verdict was given against evidence, through the misconduct of

---

(a) 1 *Marsh.* 27.—(b) 1 *T. R.* 11.

one of the jurors; and an explanatory affidavit has been read, which cannot be received;—neither is there any instance, where an affidavit of this nature has been received, after trial. It is not sworn that the other eleven jurors did not acquiesce in the verdict, and the administration of justice would be impeded, if an affidavit of this nature were permitted to be received.

Mr. Justice PARK.—I do not think the whole weight of evidence was for the defendant; but that the jury were warranted in the verdict they have given;—and I perfectly agree with my brother *Dallas*, that this affidavit should not be received.

Mr. Justice BURROUGH.—If persons were allowed to introduce affidavits of this description, it would be extremely mischievous, and tend to impeach all verdicts. At all events, such an affidavit as the present cannot be received, after trial.

Rule refused.

1817.  
HINDLE  
v.  
BIRCH.

THACKREY and others v. TURNER.

Tuesday,  
Nov. 11.

THE defendant was arrested, at the suit of the plaintiffs, in *Trinity* term, 1816, for the sum of £82, upon which special bail was put in.—On the 19th of *November*, 1816, a commission of bankrupt was issued against him.—A certificate, dated the 4th of *February*, 1817, was left for allowance on the 8th, on which day notice was given to accept a composition, provided all his creditors would accept the same, of which the bail had no notice.—*Held*, that the *ca. sa.* against the principal must be set aside, and that as the bail had not applied to enter an *exoneretur* on the bail-piece until after execution had been levied on them, they could only be relieved on payment of costs.

The plaintiffs sued out a *ca. sa.* against a principal, who having put in bail, became bankrupt, and obtained his certificate; they afterwards agreed to accept a com-

1817.  
 THACKREY  
 v.  
 TURNER.

in the *Gazette*, and the certificate allowed on the 21st of *April*, following :—On the 10th of *April*, an agreement was entered into, by the principal part of the defendant's creditors, to accept the sum of ten shillings in the pound, on their respective debts, if paid on or before the 10th day of *July*, then next, provided that all the creditors would accept the same ; and receive at the same time the defendant's note, at two years, for the remaining ten shillings. This agreement was not signed by the plaintiffs, until the 14th of *June*. On the 21st an execution was levied on the bail, for £123 : 9s., the amount of the damages and costs in this action, which sum was paid by Mr. Rogers, their attorney. A writ of *capias ad satisfaciendum* was issued against the defendant, tested the 12th of *February*, 1817, which was issued on the 23d of *April*, and delivered to the sheriff on the 25th.—The first *scire facias* against the bail was tested on the 7th of *May*, issued on the 8th, and lodged with the sheriff on the 9th ;—the second was tested and issued on the 19th of *May*, and lodged with the sheriff on the 20th.—The rule on the last writ of *scire facias* was given on the 6th of *June*, and judgment signed against the bail on the 13th, and execution levied on the 19th.

Mr. Serjt. *Lens* now moved for a rule to shew cause why the *ca. sa.* issued in this cause, and all subsequent proceedings thereon should not be set aside ; and why all proceedings taken against the defendant's bail should not also be set aside, and the sum of £123 : 9s., paid by Rogers, on behalf of, and to discharge the execution against the bail, be returned. He contended, that under the circumstances, the proceedings against the bail were void, on account of the defendant's having become bankrupt, and duly obtained his certificate, and that the agreement, which had been signed by the plaintiffs, was a discharge to himself as well as to his bail. He there-

fore relied on two grounds, *first*, that the certificate was clearly available before any proceedings were had to fix the bail; and, *secondly*, that the plaintiffs having given further time to the principal by signing the agreement for the composition, they could not proceed either against the defendant or his bail, until the terms of that agreement had been forfeited.

Mr. Serjt. *Hullock* shewed cause, in the first instance, and observed, with respect to the time given by the agreement to the defendant, that it was necessary to have shewn that the bail were not then fixed, or their situation altered by such a proceeding. If a principal give a warrant of attorney, payable by instalments, the bail would be entitled to an *exoneretur*, because they are thereby prevented from surrendering the principal, who would be also discharged until default in payment of either of the instalments. There is no case where bail have been held entitled to an *exoneretur*, where they were fixed at the time an agreement was entered into between a plaintiff and their principal. In *Thomas v. Young* (a), where the plaintiff had taken a *cognovit* from the defendant, with an agreement to receive the debt by instalments, the bail were held entitled to an *exoneretur*, because no notice was given to them; neither were they parties to the instrument, nor could they have rendered their principal after the indulgence which had been granted to him. So, in *Bousfield v. Tower* (b), the bail were held entitled to their discharge as they were not parties to the arrangement. In neither of these cases were the bail fixed, but here the plaintiffs did not sign the agreement until the 14th of *June*, and the bail had been previously fixed, and they therefore remained in the same situation as they were before such agreement had been entered into.

1817.  
THACKREY  
v.  
TURNER.

---

(a) 15 E. R. 617.—(b) 4 Taunt. 456.



1817.  
 THACKREY  
 v.  
 TURNER.

It does not appear that the defendant ever complied with the terms of the agreement. He relied on the case of *Brickwood v. Annis (a)*, where it was held that a plaintiff having sued out a *ca. sa.* against a principal, offered to accept a composition, if his other creditors would accede to it, and give him time to make terms with such creditors, did not discharge the bail on the failure of such composition.

But the court, on the authority of *Manmin v. Partridge (b)*, and *Willison v. Whitaker (c)*, considered that as the bail might, under the circumstances, have entered an *exoneretur*, they were entitled to relief; but as the application was so late, made the

Rule absolute, on payment of costs (d).

---

(a) 5 Taunt. 614. S. C. 1 Marsh. 250.—(b) 14 E. R. 599.  
 —(c) 2 Marsh. 383.—(d) See also, *Crofts v. Johnson*, 1 Marsh. 59.

Wednesday,  
 Nov. 12.

#### SELLERS v. BICKFORD.

If, to debt on bond which contained a condition, that the defendant should not open a shop within a certain distance of premises demised in a lease, and the defendant plead that he opened a shop by the licence of the

plaintiff.—*Held*, that such plea was bad, on general demurrer, on the ground that a licence, after breach, was not good, unless by deed.

THE plaintiff declared in debt, upon a bond, executed by the defendant, whereby he bound himself to the plaintiff, in the sum of £300, which was subject to the following condition: That whereas the defendant had by an indenture, made between him and the plaintiff, assigned to the latter a lease granted by one *Gaskell*, to the defendant, of a messuage, situate in *Tottenham-Court-Road*, then in the possession of the defendant, and also all the defendant's

interest in, and good will of the business, of a general shop-keeper, there carried on by him, and had also agreed not to open or keep a shop in the chandlery line, or dealer in coals wholesale or retail, in *Tottenham-Court-Road*, or within the distance of three-quarters of a mile therefrom;—the condition of the bond was, that if the defendant should not open or keep such shop as aforesaid, then the bond was to be void.—The plaintiff then averred, that the defendant opened and kept a shop on his own account, as a dealer in coals, by retail, in *Tottenham-Court-Road*, within the distance of three-quarters of a mile (to wit) within the distance of six hundred yards from the said shop therein situate, and then alleged a breach for non-payment of the penalty. The defendant pleaded, *first*, that he did not open and keep a shop on his own account, as a dealer in coals by retail, in *Tottenham-Court-Road*, within the distance of three-quarters of a mile from the said shop; and, *secondly*, that he, by the leave and licence of the plaintiff to him for that purpose first granted, did open and keep a shop on his own account, as a dealer in coals, by retail, in *Tottenham-Court-Road*, within the distance of three-quarters of a mile, from the said shop therein situate. The plaintiff added a *similiter* to the first plea, and demurred generally to the last.—The defendant joined in demurrer.

Mr. Serjt. *Blosset*, in support of the demurrer, observed, that the only question was, whether a covenant, by deed, could be altered or discharged, without deed. In *Comyns's Digest* (a), it is laid down, that if a man make a promise, he to whom it was made, before a breach may discharge it by parol, but that after breach, a discharge by him to whom the promise was made is not good, without deed. In *Robards v. Stoker* (b) it

1817.  
 SELLERS  
 v.  
 BICKFORD.

(a) Action on the case upon *assumpsit*, tit. G.—(b) *Palmer*, 110.

1817.  
 ~~~~~  
 SELLERS  
 v.  
 BICKFORD.

was held, that an accord, with satisfaction, could not be pleaded before breach, without deed, because it enures as a release of the covenant. After breach, accord and satisfaction might be pleaded without deed, because that is not in discharge of the covenant, but of the breach only, which agrees with the doctrine laid down in *Peyton's* case (a), and *Blake's* case (b).—This licence is, in effect, a discharge of the covenant after breach, otherwise than by deed. The case of *Little v. Holland* (c), is precisely in point; and Lord *Kenyon*, in his judgment, mentioned an action brought by *Garrick v. Barry*, where it appeared on the trial, that the plaintiff, as manager of a theatre, had given the defendant a parol licence to be absent, but as the articles on which the action was founded required such a licence to be in writing, the court held, that it could not be dispensed with, and that the parol agreement was no answer to the plaintiff's action.—If there be a covenant not to assign, a parol licence cannot be pleaded to an action brought on that covenant; and, therefore, no licence, unless in writing, can be good (d). In *Braddick v. Thompson* (e), it was held, that a parol agreement to waive and abandon an award could not be pleaded in an action on an arbitration bond, for the court were quite satisfied, that the defendant could not plead a collateral agreement, by parol, to invalidate a claim arising upon deed, but that his only remedy was by a cross action. In *Fortescue v. Brograve* (f), which was an action for breach of covenant on a deed, and the defendant pleaded a parol agreement afterwards, in discharge of the former covenant; the court held, that such a plea was not good.

---

(a) 9 *Coke's Rep.* 77.—(b) 6 *Coke's Rep.* 44.—(c) 3 *T. R.* 590.  
 —(d) *Roe, d. Gregson v. Harrison*, 2 *T. R.* 425.—(e) 8 *E. R.* 344.—(f) *Style*, 8.

He referred to the cases of *Blemerbasset v. Pierson* (a) and *Hayford v. Andrews* (b), to shew, that where there was an agreement pleaded to delay payment of money due on a bond, such plea was bad;—there is no precedent of any plea similar to the present. This is an accord before breach, by parol, and without satisfaction; and as this case must be governed by that of *Little v. Holland*, the plaintiff is entitled to judgment.

1817.  
SELLERS  
v.  
BICKFORD.

Mr. Serjt. *Onslow*, *contra*, admitted that the condition was good, although the bond, in itself, was odious;—that all the cases which had been cited in support of the demurrer were distinguishable from the present, and that in *Blemerbasset v. Pierson*, the agreement appeared to be in writing, under hand. In this case it did not appear that the licence was not under seal; and the plaintiff, therefore, should either have replied, or specially demurred to the last plea. As to the instance of its being a licence to assign, without writing, it was so reserved by the parties.

The learned serjeant was proceeding in his argument, when he was stopped by the court, who referred to the case of *Thomson v. Brown* (c), as being precisely in point, and by which the present must be governed. They observed, that the plea need not be specially demurred to, because it was bad in substance, that if the covenant had been not to open a shop without licence, then such licence might have been pleaded, but that such plea was radically bad, and, that, consequently, there must be

Judgment for the plaintiff.

---

(a) 3 Lev. 234.—(b) Cro. Eliz. 697.—(c) Ante, 358.

Wednesday,  
Nov. 12th.

HARVEY v. GOODFORD.

If a declaration be delivered on the *essoign* day of *Hilary* term and an *imparlance* to *Easter* be given to the defendant, when a rule to plead was given, but no demand of plea made.—*Held*, that the plaintiff having signed judgment in *Trinity* term for want of a plea was irregular, and the court set aside the proceedings.

MR. Serjt. *Pell*, on the first day of this term, obtained a rule *nisi*, that the judgment signed in this cause, and the subsequent proceedings thereon, should be set aside for irregularity, with costs; and that, in the mean time, all further proceedings should be stayed.

Mr. Serjt. *Onslow* now shewed cause, when it appeared that a writ of *copias* issued against the defendant, returnable in the last *Michaelmas* term, and that an appearance had been entered for him, as of that term:—That on the 20th of *January* last, being the *essoign* day of *Hilary* term, a declaration was delivered, indorsed to plead within the first four days of that term, when it was objected to, and returned to the plaintiff's attorney, as being too late for a plea of that term.—On the 21st of *January* the declaration was again delivered, when an *imparlance* was obtained until *Easter* term, when a rule to plead was given, but no demand of plea made, whereupon, on the first day of last *Trinity* term, a second rule to plead was given;—on the 9th of *June* a demand of plea made; and, on the following day, judgment was signed. He insisted, that the plaintiff was, under the circumstances, entitled to judgment; but the officer of the court certified, that the declaration being delivered on the *essoign* day of *Hilary* term, it was too late for a plea of that term; and that, therefore, the defendant had an *imparlance* to *Easter*, and as he did not demand a plea in that term, but signed judgment as of *Trinity*, it was irregular; the rule, therefore, was made

Absolute.

## COOKE v. TANSWELL.

Saturday,  
Nov. 15th.

MR. Serjt. *Vaughan*, on the first day of this term, on the authority of *Blakey v. Porter* (a), had obtained a rule nisi, that the plaintiff might be permitted, at his own expence, to read and take a copy of an indenture of apprenticeship made between him and the defendant, which was then sworn to be in the possession of the latter, one part of which only had been executed by both parties.

Mr. Serjt. *Lens* on a subsequent day shewed cause, on an affidavit of the defendant, which stated that he had no such indenture in his possession, nor did he know where it was:—But the court held the affidavit to be insufficient, and the case stood over for a supplemental one to be filed, in which they directed him not only to swear, that he did not know where the indenture was, but that he had not destroyed, or ever had such an instrument, and that if he had, he had not divested himself thereof by delivering it over to any other person.—The defendant, in his supplemental affidavit, denied having divested himself of the indenture, or having destroyed it, and stated that he did not know in whose possession it was, or what had become of it:—But the court said, that the defendant should have positively stated, that the indenture never existed, that he never had it in his possession, or that he had searched for it, and had not been enabled to find it; they also observed, that if an attachment were to issue against him for contempt, for refusing its production (b), he would be obliged to answer on interrogatories, and

If one part only of an indenture of apprenticeship be executed by the plaintiff and defendant, and sworn to be in the possession of the latter.—*Held*, on a notice given by the plaintiff to produce it, that an affidavit of the defendant, stating that he had no such indenture in his possession, and that he had not divested himself of it, nor destroyed it, and that he did not know in whose possession it was, or what had become of it, was insufficient, for that he should have stated that it never existed, that he had never possessed it, or that he had not been enabled to find it.

(a) 1 Taunt. 386.—(b) See *Baleman v. Phillips*, 4 Taunt. 157.

1817.  
 COOKE  
 v.  
 TANSWELL.

as the supplemental affidavit was not sufficiently explanatory, the rule must be made

Absolute (a).

(a) See the cases of *King v. King*, 4 Taunt. 666, and *Street v. Brown*, 1 Marsh. 610.

Monday,  
 Nov. 17th.

HOLMES v. BLOGG.


If an infant enter into partnership with an adult, and take a lease of premises from another person for carrying on a business, for which he pays a premium of three hundred guineas, one half in cash, and accepts bills of exchange, drawn by the defendant for the remainder in the name of the partnership, which partnership he dissolves on his becoming of age.—*Held*, that the defendant, four months after such dissolution, having sued the adult partner alone, on one of the bills, and accepted a surrender of the lease from him, it should have been left to the jury to determine whether this arrangement avoided the plaintiff's contract, it having been made without his privity:—and the court granted a new trial.—*Quære*, Whether four months after an infant becomes of age be a reasonable time for him to avoid a lease entered into during his minority?

THIS was an action of *assumpsit*, for money had and received. The declaration contained the common money counts, and the defendant pleaded the general issue.—On the trial of the cause before Mr. Justice *Park*, at *Guildhall*, at the sittings after last *Easter* term, it was proved that the plaintiff in *March*, 1816, had formed a partnership with a person by the name of *Taylor*, as shoemakers, and for that purpose had taken a lease of certain premises from the defendant, for which they agreed to pay a premium of three hundred guineas, one half in cash, and to accept bills for the remainder, payable at different periods. On the execution of this lease, one hundred and fifty guineas were paid by the plaintiff, and three bills of exchange, drawn by the defendant for the remainder, were accepted by him, in the joint names of himself and *Taylor* his co-partner, the first of which was made payable four months after date. During the time these transactions took place, the defendant was an infant, as he did not

become of age until the month of *June* following, and the day after that event, he dissolved the partnership with *Taylor*; but his name remained over the door for three weeks after. In the month of *September* following, *Taylor* entered into a new arrangement with the defendant, by which he got a remission of part of the rent, and the taxes were paid for him by the defendant. When the first bill of exchange became due, it was dishonoured, and the defendant sued *Taylor* alone, who compromised the action without the knowledge of the plaintiff, by surrendering the lease to be cancelled, and destroying the bills of exchange not then due. A book containing the particulars relative to the partnership account, kept by the plaintiff, was produced, and the sum for which this action is brought, was entered in his own handwriting, amongst other payments made by him, as a payment on account of the partnership. It was objected, that this payment, having been made upon a joint partnership account, could not be recovered back by one of the partners on whose account such payment was made; but the learned judge being of opinion that the lease was a voidable contract, it should have been shewn that notice of avoidance was given within a reasonable time after the infant became of age, and that as no evidence of that fact had been given, until nearly four months had elapsed, which was a sufficient space of time to affirm the contract and bind the plaintiff, he directed a nonsuit; and the jury accordingly found a verdict for the defendant.

Mr. Serjt. *Best* in the last term had obtained a rule to shew cause why the nonsuit should not be set aside, and a new trial granted.

Mr. Serjt. *Copley* now shewed cause and insisted, that although the contract might be voidable, and the plaintiff might put an end to it, still, if he did nothing on his

1817.  
  
 HOLMES  
 v.  
 BLOGG.



1817.  
  
 HOLMES  
 v.  
 BLOGG.

becoming of age to declare his dissent from an engagement entered into during his minority, he was bound by it. It is laid down in 1 *Rolle's Abridgment* (a), that "if an infant continue in possession, after his full age, of lands demised to him during his minority, he affirms the lease, and makes himself liable for arrears of rent incurred before."—The arrangement which took place between the plaintiff and *Taylor* cannot affect the defendant, as no communication was made to him until four months after the plaintiff had become of age. There is a wide distinction between contracts which are voidable, and those which are void, for, if an infant enter into a contract for a sale of goods, it cannot be enforced, unless confirmed by him after he becomes of age. So, if an infant do not confirm by a positive act, any engagement, such as a bill of exchange, or promissory note, which must expose him to losses, the engagement is void; but in a lease, which is a voidable contract, where an infant may have a beneficial interest, if he do nothing to avoid such contract, when he becomes of age, it is positive and binding on him. In order to avoid or confirm a contract, it is necessary for an infant to make his election within a reasonable time after he becomes of age. In *Doe d. Bromfield v. Smith* (b) where a tenant held under an agreement for a lease at a yearly rent, whereby it was stipulated that such agreement should continue for the life of the lessor, and that a clause should be inserted in the lease, giving the lessor's son power to take the lease for himself when he became of age; the court of *King's Bench* held, that he must make his election within a reasonable time after he came of age; that the delay of a year was unreasonable, but that if the notice had been given within a week or a fortnight it would be reasonable. The same principle is applicable to this case, as here the plaintiff continued in

---

(a) 731. pl. 45.—(b) 2 T. R. 436.

possession as far as related to the lessor, for the space of four months, during which time he had the option either of avoiding or confirming the contract. There is a material distinction between a contract made by an infant in respect of lands, and a contract in respect of goods. In the one, something positive must be done;—in the other, if nothing be done, the contract remains in force, *suo vigore*, and if no communication be made within a reasonable time, the infant is bound. In *Kirton v. Elliott (a)*, Mr. Justice *Haughton* said, ‘If a lease be made of an acre of land, to an infant, rendering £100 rent by the year, and he doth occupy and enjoy this, he shall be charged with the rent, he being here to be taken as a purchaser,’ and Mr. Justice *Dodderidge* there said, ‘If a greater rent be reserved than the land is worth, there, peradventure, the infant shall not be charged with it.’ In that case, the court were all of opinion, that the infant lessee was liable to pay the rent.—[Mr. Justice *Park*. In the case of *Evelyn v. Chichester (b)*, Mr. Justice *Yates* confirmed the doctrine laid down in *Kirton v. Elliott*.] The defendant did not know that the plaintiff was an infant, until he entered into the new arrangement with *Taylor*, and on the dissolution of the partnership, *Taylor* remained in possession, and no notice was given by the plaintiff to avoid the lease, till four months after such dissolution. The defendant had no knowledge that the money, for which this action was brought, was the separate property of the plaintiff, and as the bills were accepted by the latter, on the partnership account, he had a right to consider that the sum advanced was also on the joint account. If it should be considered that the infant should be entitled to recover this money, how could the defendant have received possession from *Taylor* alone?—The contract was

1817.  
HOLMES  
v.  
BLOGG.

---

(a) 2 *Bull.* 69.—(b) 3 *Burr.* 1719.

1817.  
HOLMES  
v.  
BLOGG.

joint, and the action should have been brought in the joint names of the plaintiff and *Taylor*, and if any injustice had been done to the former, he might have had his remedy against *Taylor*, for money paid to his use. The sum advanced was entered by the plaintiff, in account, as partnership-money, and as the defendant considered it to be so paid, *Taylor* might have continued in possession. The defendant was perfectly right in having sued *Taylor* alone on the bill which was dishonoured, as he had no remedy against the defendant, who was an infant at the time he accepted it, and he had made no promise of payment after he became of age. He, therefore, insisted, that under all the circumstances, and as the sum for which this action was brought might be deemed the joint money of the plaintiff and *Taylor*, the rule ought to be discharged.

Mr. Serjt. *Best*, *contra*, submitted that the defendant, having received money from the plaintiff, during his infancy, on a contract which he avoided after he became of age, the latter had a right to recover it back. That the defendant, by his subsequent conduct, had not only made himself liable to the acts of *Taylor*, but also acknowledged that the plaintiff was under age at the time the money was received, by having entered into a new arrangement with *Taylor*, by having sued him alone on the bill of exchange, when dishonoured, and by the surrender of the lease to him by *Taylor* alone. This case stands on peculiar circumstances, and cannot be affected by the general rules of law; neither is it touched on by any antecedent decisions;—it is, in itself, of the utmost importance, as justice requires that the protection of the law should be afforded to infants, to prevent their being plundered to any extent. Although this contract might be good, between the parties, still, as it has turned out to be entirely to the prejudice of the plaintiff, and

that *Taylor* has alone been benefited by it, the conduct of the defendant has sufficiently shewn that he did not consider the plaintiff was interested. On his becoming of age, he not only disaffirmed the contract of co-partnership with *Taylor*, but the defendant, himself, acceded to his so doing; and although the acquiescence of the defendant was not made, until four months after the plaintiff became of age, it still has reference to the antecedent time. The authority cited from *Rolle's Abridgment*, could not assist the defendant, as there, there was no evidence of the plaintiff's continuing in possession after he became of age, and he could not affirm the lease before. Here, the house was taken merely for the purpose of carrying on a business, during the plaintiff's minority, and there was no positive affirmance of the contract afterwards. The case of *Doe d. Bromfield v. Smith*, was distinguishable from the present, as there, the plaintiff demised premises to the defendant under a lease, in which it was stipulated, that if her son should be desirous of living in the premises when he became of age, the lease should be void; but, in that case the son was no party to the lease, and the court there decided that the son should have made his election within a reasonable time, but it did not apply to a case of infancy. The case of *Kirton v. Elliott* is merely confirmatory of the doctrine laid down in *Rolle*. If an infant take an estate and derive benefit from it, he is liable to the contract, but if he do not take possession, the case is different; for by continuing in possession, the infant makes himself liable for the payment of rent. In this case the infant derived no advantage, for the whole of the benefit accrued to his adult partner. It is doubtful whether the case of *Kirton v. Elliott* is the same as *Ketsey's* case, reported in *Croke James (a)*, where it was held that a lease


1817.  
  
 HOLMES  
 v.  
 BLOGG.

---

(a) 320. The reporter having examined the authorities, considers, both from the pleadings and circumstances, that they are not the same.

of the disaffirmance of such contract should be given by him, within a reasonable time after he becomes of age. If the present were a mere abstract question, of whether such notice had been given in time or not, I should have no hesitation in saying that four months were an unreasonable time; and that, therefore, the plaintiff was bound by the lease. But this case does not rest simply on this; it is entangled with many other peculiar circumstances, which might render such a notice unnecessary, and whether an affirmance or disaffirmance of the contract was necessary, is only to be collected from the conduct of the parties, and all the circumstances under which the contract was effected. What, therefore, are the real facts? Has or has not the defendant treated the plaintiff in such a manner as to dispense with a notice of his disaffirmance? The plaintiff being under age, entered into a partnership for the express purpose of carrying on a particular trade, with a person by the name of *Taylor*, and both of them executed a lease, by which they became tenants to the defendant. The trade was conducted by both the partners, until the defendant became of age;—the day after that event took place, the plaintiff gave his partner, *Taylor*, notice of his intention to dissolve the partnership. It appears, that some time afterwards, *Taylor* removed the name of the plaintiff from the door. This, therefore, was a complete dissolution of the partnership, as to them, although it did not affect the right of the defendant, with respect to the lease which had been granted. Although, in all probability, when the partnership was dissolved, the infant intended to withdraw himself altogether from the concern (that is, not only from the trade, but from the premises also on which it was conducted) still we cannot take the intention of the plaintiff into consideration, but can only consider what notice the defendant

1817.  
HOLMES  
v.  
BLOGG.

1817.  
  
 HOLMES  
 v.  
 BLOGG.

has received, amounting to a disaffirmance of the lease. An actual notice is unnecessary. In the first place, it may be implied from circumstances; and, in the second, it may be altogether dispensed with. The question then is, Has the defendant, by his conduct, subsequent to granting the lease, dispensed with a formal notice? There is a very strong circumstance to shew that he has dispensed with it, for the bills of exchange being drawn on the firm, and accepted in the name of the partnership, when the first of them became due and was dishonoured, the defendant sued *Taylor* alone. Why did he not proceed against them both, if he considered the lease to be a continuing contract, on the part of the plaintiff?—There is another circumstance, still stronger, to shew that the defendant did not consider the plaintiff liable under the lease.—The plaintiff having retired in *June*, the defendant, in the month of *September* following, came to an entire new arrangement with *Taylor*. What right had he to do so, when the plaintiff was a joint lessee? The new arrangement, *ex vi termini*, cancelled the former; neither was the plaintiff even a party to it. In consideration of staying proceedings on the bill, the defendant ultimately received a surrender of the lease from *Taylor*, and released him from his liability on that and the other bills which had not become due, by returning them to him; and all this was done without the knowledge or privity of the plaintiff. He therefore treated *Taylor* as the sole lessee;—I will not take upon myself to say how a jury might decide,—far less how they ought to decide; but under all the circumstances, I think it should be left to them to determine, whether or not the defendant has dispensed with the notice which might have been necessary on the part of the plaintiff, or whether the latter has recognized the contract entered into by him as an infant since he be-

came of age. I do not form any conclusion, whether four months be, or be not, a reasonable time; neither shall I decide on any of the legal points which have been raised in the arguments; but for the reasons above stated, I think there should be a new trial.

Mr. Justice BURROUGH.—I do not mean to say what the ultimate result of this case may be; but think, that under the circumstances, it is fit there should be another inquiry. There is no objection to the action, in its present form, as the question is, whether the plaintiff be entitled to recover back the 150 guineas, paid by him to the defendant as a premium for the lease. The plaintiff dissolved the partnership the day after he became of age, and left *Taylor* in the entire possession of the house, under the lease. This lease formed part of the effects of the partnership, which was dissolved; and, therefore, the plaintiff had no possession under the lease, for he had no intention of carrying on the business, after the dissolution of the partnership, but left *Taylor* in the entire possession of the trade, and the premises, wherein it was conducted. How was *Taylor* treated by the defendant, after the dissolution? As being in the sole possession of the property. It must be inferred, that he knew who was actually in possession; for he treated *Taylor* as though he had the exclusive interest under the lease, for he not only accepted a surrender of it from him, but released him from the payment of these bills, which he should have received as the remainder of the premium. This, therefore, fortifies the presumption, that he considered *Taylor* solely liable for the rent. It is another strong feature of the case, that the action, which had been brought against *Taylor* alone, was abandoned, and that on the surrender of the lease, *Taylor* was acquitted of the rent then due. Besides, no mention was ever made of the plaintiff during the whole of this transaction. These, therefore, are strong facts,

1817.  
HOLMES  
v.  
BLOGG.

1817.  
HOLMES  
v.  
BLOGG.

which I think ought to be left to the consideration of the jury.

Mr. Justice PARK.—Although, with the greatest deference, I do not perfectly concur with the conclusions which have been drawn by my learned brothers; still, it is fit that this case should undergo a further investigation. The transactions appear to be extremely singular, but the objections which have been now introduced, were not stated at the trial. I thought that it was necessary, in order to maintain the action, for the plaintiff, who was an infant, in the case of a voidable contract, to do some act to avoid it after he became of age. It has been contended, that he was privileged to ratify or disaffirm the contract within a reasonable time after he became of age. But could he be allowed four months to decide, whether he would ratify it or not? It was left to me at the trial, to decide whether it was necessary for the infant to disaffirm the contract, and I certainly thought that four months was too great a lapse of time to entitle him to recover;—but the plaintiff now applies, not only to correct my opinion, but also to have a new trial. The principle on which my decision was founded, was that it did not appear, by the evidence, that the defendant knew that the money was paid to him by the infant alone, or that the latter had advanced that sum for the advantage of *Taylor*. I could not connect the defendant with having knowledge of the advances having been made by the infant alone, by a retrospection of the arrangement with *Taylor*, in the month of *September*.

Rule absolute for a new trial.



## HARDING v. GREENING.

Monday,  
Nov. 17th.

THIS was an action for a libel, contained in a letter, addressed to a Mrs. *Lambert*, imputing to the plaintiff theft and dishonesty.—At the trial before Lord Chief Justice *Gibbs*, at *Westminster*, at the sittings after last term, it appeared in evidence, that the plaintiff had lived as journeyman to the defendant, for twelve years, during which period he had from time to time been employed, by Mrs. *Lambert*, as a carpenter. In the month of *March*, 1816, the defendant sent in his bill to Mrs. *Lambert*, for the payment of £6 : 11s : 4d., for work done. Mrs. *L.*, considering the charges exorbitant, called in a surveyor, to inspect the work, who estimated that there was an overcharge of £1 : 14s : 7d.—Mrs. *Lambert*, in consequence, returned the bill to the defendant, and offered to pay him, on his deducting the latter sum.—In the course of a few days, Mrs. *Lambert* received a letter from the defendant, which formed the ground of the present action, in which was enclosed the bill, which had been returned to him, by Mrs. *Lambert*:—It further appeared, that the defendant was in the habit of employing his daughter to make out his bills, and write his letters, and that the bill, sent to Mrs. *Lambert*, was written by the daughter; but no evidence was adduced to prove that the letter was written by her, although it appeared to be in the same characters as the bill.—His Lordship thought, that although the bill was in the handwriting of the defendant's daughter, and although she was employed by him to make out such bills, and write his letters, still that it did not fix the defendant as the author of the letter in question; and, that, although the bill reached the hands of Mrs. *Lambert*, and was returned by her to the defendant; yet, that this circumstance

In an action for a libel contained in a letter :  
Proof that it was written by the defendant's daughter, who was authorised to make out his bills and write his general letters of business, is not sufficient, unless it can be shewn that such libel was written with the knowledge of or by the procurement of the defendant ; neither can the daughter be called as a witness, to prove by whose direction such letter was written.

1817.  
 ~~~~~  
 HARDING  
 v.  
 GREENING.

would not connect the defendant with a knowledge that the letter, containing the libel, had been returned, and that as the general proof shewed that the daughter was employed to transact his business, that he might have given her directions to send the bill; but as there was no proof that he even saw the letter which was written, it was not sufficient to shew that the defendant was cognizant with the contents of it, so as to fix him as being the author, and he consequently directed a nonsuit.

Mr. Serjt. *Vaughan*, in the last term, had obtained a rule *nisi*, that this nonsuit should be set aside and a new trial granted.

Mr. Serjt. *Best* was, on this day, about to shew cause, when the court called on Mr. Serjt. *Vaughan* to support his rule.—He insisted that it should have been left to the jury to determine, whether the defendant caused the letter in question, which contained the libel, to be written: he relied on the case of *Rex v. Johnson (a)*, to shew, that under the circumstances, there might have been sufficient presumption for the jury to have found a publication by the procurement of the defendant, and Lord *Ellenborough* there held, that ‘the only question was, whether the defendant were accessory to the publication? For if he were, the offence was established. For one who procures another to publish a libel, is, no doubt, guilty of the publication, in whatever country it is in fact published in consequence of his procurement;’ and Mr. Justice *Lawrence* said, ‘Is there not evidence to go to the jury, for them to decide, whether the papers were sent by the defendant, or by some other person?’ So, here, it should have been left to the jury, whether the letter was sent by the defendant or by a third person through his procurement. There was the strongest presumption to suppose it was, as it appeared that the bill, demanding pay-

---

(a) 7 E. R. 66.

ment, was in the same hand-writing as the libel. The jury, therefore, should have determined whether this letter were or were not written without the authority of the defendant;—the daughter might have proved this fact. As, therefore, under the circumstances, it may be inferred, that the libel was published, either with the procurement of the defendant, or with his knowledge, the case required further consideration.

Mr. Justice DALLAS.—With respect to the last ground whereon my brother *Vaughan* has insisted that there should be a new trial, *viz.*, that of examining the defendant's daughter as a witness, it might have afforded a degree of evidence to be left to the jury; but as the plaintiff did not do so, it would be extraordinary if the court were to accede to such an application. The question is, whether, in this case, any evidence has been given, to shew that the defendant was the author of the libel in question. No distinction can be drawn, between the evidence necessary to support a libel in a civil or criminal proceeding, for both the writing and publication must be proved, in the one case as well as the other. It was therefore necessary for the plaintiff to have shewn, that if he had indicted the defendant, the evidence offered at the trial would have been sufficient to shew that he was the author of this libel. That, however, is impossible, for by the general rule of law, a principal is only responsible for the acts of his agent within the limits of his authority. But a distinction may be drawn, with regard to this rule, between civil and criminal cases. Could the defendant's daughter, in this case, be considered to be within the scope of such authority? It appears that she was employed to make out her father's bills, and write letters for the purpose of conducting his business; but no evidence was adduced to prove, that she was authorized to exceed these limits, or deviate from this

1817.

HARDING  
v.  
GREENING.

1817.  
HARDING  
v.  
GREENING.

common course, and much less so, that she was instructed or authorized, by him, to write the libel in question; neither was there any proof of his having recognized the letter so written. This, therefore, is barely a question of legal authority, and as it was not proved that the defendant ever saw the letter, still, my brother *Vaughan* has contended, that the daughter might be called as a witness, to shew by whom and by whose procurement it was written. But how could she be called as a witness? It does not appear that any one had authorized her to do an illegal act, and even if it could have been proved that she wrote the letter herself, she might have refused to answer any question which might tend to implicate her; I am therefore clearly of opinion that the evidence was wholly insufficient to shew that this letter was written either by the command or with the knowledge of the defendant, and as there has been no previous decision to authorise the application, now sought for by my brother *Vaughan*, that the Lord Chief Justice was perfectly correct in directing a nonsuit.

Mr. Justice PARK. I am of the same opinion.—Can it be supposed, because the defendant had given a general authority to his daughter to make out his bills and write his letters of business, that he might be criminally fixed by her acts? I perfectly agree with my brother *Dallas*, that the daughter could not be examined, for had she written this letter herself, she might have been indicted for a libel, and if even she had been an infant, she would have been liable to an action for the tort.

Mr. Justice BURROUGH concurred.

Rule discharged.

LEE and another, v. MUNN.

Tuesday,  
Nov. 18th.

THIS was an action brought against the defendant, an auctioneer, for the recovery of the sum of £200, being a deposit paid to him by the plaintiffs on the purchase of a freehold estate by public auction, the title to which afterwards proved defective; the plaintiffs also claimed interest on the deposit as well as £37 : 11s : 2d. for the costs relative to the investigation of the vendor's title. The first count of the declaration stated, that the defendant, on the 23d of *November*, 1812, caused to be put up and exposed to sale by public auction, premises therein described, subject to certain conditions of sale, one of which was, that the highest bidder should be the purchaser, and pay immediately a deposit of £20 *per cent.* in part of the purchase money, to the defendant, and sign an agreement to pay the remainder, on or before the 30th of *January*, 1813, on a conveyance being made according to the terms mentioned in the conditions of sale. The plaintiffs then averred, that they became the purchasers of the premises in question, for the sum of £1000, and that they then paid to the defendant £200, as a deposit of £20 *per cent.*, in part of the purchase money, and that although they were ready and willing to perform and fulfil all things in the conditions contained on their parts, as such purchasers, to be performed and fulfilled, and to pay the remainder of the purchase money, on a conveyance being made agreeably to the conditions of sale, and to complete the purchase; yet, that the defendant did not, nor would make or procure to be made to the plaintiffs a good title to the premises, or make a conveyance thereof, agreeably to the conditions of sale, by reason whereof the plaintiffs had been deprived of all the benefits and advantages which would have arisen to them

Where the purchaser of an estate, by public auction, deposits a sum with the auctioneer, as part of the purchase money, until the vendor make out a good title, according to the conditions of sale.—*Held*, in an action to recover such deposit from the auctioneer, that he is not liable for interest, although nearly four years may have elapsed from the time of the sale, on the ground that no demand had been made on him for the re-payment of the deposit.

1817.

~

LEE

v.

MUNN.

from the completion of the purchase, and put to the expense of £100, in endeavouring to procure the title, and to get the purchase completed, and in and about the investigating the title of the vendors of the premises to sell and convey the same, and had lost all gains and profits which they might and otherwise would have made and acquired from using and employing the sum of money so paid by them as a deposit, and other monies provided and kept by them for the completion of the purchase. The declaration also contained counts for interest, and the common money counts. The defendant pleaded the general issue of *non assumpsit*, and paid the deposit money into court, upon the count for money had and received. On the trial of the cause, before Lord Chief Justice Gibbs, at Guildhall, at the sittings after the last term; the evidence adduced on the part of the plaintiffs consisted of the following letters:—The first of which was dated on the 6th of April, 1816, and written by the defendant to one of the plaintiffs, in which he stated that he had seen his attorney, who had advised the plaintiffs to complete the purchase;—the second was dated on the 22d of May, 1816, and written by the defendant's attorney to the attorneys for the plaintiffs, as follows:

‘ *Munn* ats. *Lee*.’

‘ Gentlemen,

‘ I understand, from Mr. *Munn*, that he saw Mr. *Lee* yesterday, who expressed himself still willing to complete the purchase, provided a good title could be made; and that it was agreed between them, that Mr. *Lee* should be entitled to interest on his deposit, from the time of sale, together with costs,—from some recent investigations, I have no doubt we shall be enabled to make out a very satisfactory title shortly, and particularly with respect to the possession of one of the thirds

‘ of the estate;—under such circumstances, I presume  
 ‘ you will suspend the action for the present; and I have  
 ‘ no hesitation in adding that we have no intention to  
 ‘ defend this action.’

1817.

LEE  
 v.  
 MUNN.

The third letter was dated the 29th of *July*, 1816, from the defendant's attorney, addressed to the attornies for the plaintiffs, stating that the vendors were willing to accede to certain proposals made by them for settling the purchase, as to one third of the estate, *viz.* that the vendors were to have the rent to *Midsummer*, then last, to pay the interest on the deposit to the same period, to pay the costs of this action, together with the expenses of investigating the title and costs of the conveyance, and that the purchasers should take the title as it was.—The fourth letter was dated on the 20th of *November*, 1816, from the same, to the same, intimating a wish that the purchase might shortly be completed. The last letter was dated the 18th of *February*, 1817, from the same, to the same, in which the defendant's attorney stated, that the vendors objected to the completion of the purchase on the terms proposed.—A person, who attended the sale, proved that the defendant was the auctioneer, that one of the plaintiffs was declared to be the purchaser, and that after the estate was knocked down, a deposit of £200 was paid by him, by a draft on his bankers.—The Lord Chief Justice considered that the plaintiffs were not entitled to recover from the defendant the costs of investigating the title, and that the latter, being the auctioneer, was not liable for the expences of the purchase; but as he conceived the plaintiffs claim for interest, to be a question of considerable importance, on which he wished to have the opinion of the court, he directed a verdict to be entered for the plaintiffs, damages £43, being the amount claimed by them for interest, subject to be altered to a verdict for the de-

1817.

L

v.

MUNN.

pendant, or if the court should be of opinion that the verdict should be for the plaintiffs, then the damages were to be reduced as the court should direct.

Mr. Serjt. *Lens*, in the course of the last term, having accordingly obtained a ruse *nisi*, and cited the cases of *De Bernales v. Wood* (a), and *Calton v. Bragg* (b).

Mr. Serjt. *Pell* now shewed cause, and observed, that the only question to be considered was, whether the plaintiffs were entitled to any and what interest on their deposit, the purchase not having been completed. He contended that they were entitled to interest from the time of the deposit to the commencement of this action; or, that at all events, they were entitled to it from the time of paying the deposit to the 22d of *May*, 1816, being the date of the letter, written by the defendant's attorney to the solicitors for the plaintiffs.—It has been clearly established, that interest is recoverable as against a principal, provided there be a count in the declaration for it, and in the case of *Fargubar v. Farley* (c) it was held, that if a purchaser pay a deposit to auctioneers at the time of sale, in part of his purchase money, and recover it from them, in consequence of the vendors not being able to make out a good title, that such purchaser might recover interest on such deposit from the vendor from the time the purchase should have been completed, on alleging the special damage in his declaration. In *Flureau v. Thornhill* (d), which was an action against the principal, who had paid the deposit and interest into court, it was merely determined that a purchaser could not recover any compensation for the loss of a bargain where the title proved bad, and Mr. Justice *Blackstone* there observed, that 'Contracts of this

---

(a) 3 Camp. 258.—(b) 1b E. R. 223.—(c) *Ante*, 322.—  
(d) 2 Sir W. Black. 1078.



'description were merely upon condition, frequently expressed, but always implied, that the vendor has a good title; if he has not, the return of the deposit with interest and costs is all that can be expected.' So, in *Cornish v. Rowley* (a), which was an action for money had and received, to recover the amount of a deposit paid by the plaintiff to the defendant, on an agreement for the purchase of an estate, the defendant having failed to make out a good title on the day when the purchase was to be completed.—Lord *Kenyon* said, 'As a good title was not made out on the day fixed, I shall direct the jury to find a verdict for the deposit, with interest up to that day.'—The case of *Richards v. Barton* (b), was even stronger than the preceding one. So, in *Turner v. Beaurain* (c), where a house was sold by auction, an objection was taken at the trial, as to a fee farm rent of 5s. 4d., which was not noticed in the particulars of sale, and the purchaser brought an action for breach of the agreement; the defendant declining to argue the point, a verdict was given against him for the deposit, with interest, together with the expenses incurred in investigating the title, as they were laid in the declaration as special damage;—and Lord *Ellenborough*, in the case of *De Bernales v. Wood*, allowed interest as special damage from the day when the purchase ought to have been completed, the plaintiff having alledged as special damage, that he had lost the use of his money. In *Maberley v. Robins* (d), which was an action against an auctioneer, there was no count in the declaration for interest; and, therefore, the plaintiff's counsel consented to take the verdict for the amount of the deposit only, and not on the ground that the defendant was an

1817.

Lxx

v.

Munn.

(a) *M. S. K. B. M. T.* 40 *Geo. 3.* Vide *Selwyn's N. P.* 4th edit. 170.—(b) 1 *Exp. Rep.* 268.—(c) *Sugden's Vendor and Purchaser*, 4th edit. 193. & 227.—(d) 5 *Taunt.* 625.

1817.

LEE

v.

MUNN.

auctioneer. [Mr. Justice *Dallas*.—In the case of *Farquhar v. Farley*, which was an action against the principal, Lord Chief Justice *Gibbs* drew the distinction between the case of a principal, and an auctioneer.] It was there unnecessary to draw such a distinction, as the action was brought against the former; neither was it in that case discussed, whether an auctioneer, under the circumstances, could be deemed liable for interest.—[Mr. Justice *Dallas*. An auctioneer cannot be chargeable, as such, unless he make interest of the money deposited with him.] It would be then necessary to have recourse to equity.—It cannot be expected that the plaintiffs should prove that the defendant made interest. This case stands on peculiar grounds, and in whatever situation the defendant was placed, he would be liable for interest, for the facts take it out of the general rule. In the case of *Spurrier v. Elderton (a)*, where the plaintiff, an auctioneer, having sold an estate for the defendant, the title of which was objected to, and the plaintiff refused to return the deposit, an action of *assumpsit* on the common money counts was brought, in which he afterwards paid the costs, Lord *Ellenborough* held, that the money paid on account of the costs, in this form of action, could not be recovered, but that there should have been a special count; he was however of opinion, that the plaintiff might recover the money actually paid on the other counts.—That case establishes, that an auctioneer may maintain an action against the principal to recover damages. The defendant, in this case, has acted as principal, and conducted himself as such to a late period. He, therefore, cannot protect himself as being an auctioneer or agent, for he is liable in that capacity, unless he disclose the name of the principal at the time of sale (*b*). Although the auc-

(a) 5 *Esp. Rep.* 1.—(b) *Hanson v. Roberdeau, Peake's N. P. Cases* 119.

tioner here was not called on to disclose the name of the principal, still having acted in that capacity, he would be liable as such. The letters, themselves, are decisive to shew that the defendant acted as principal, and in neither of them does he refer to the real principal or his attorney. The plaintiffs, therefore, were not only entitled to the deposit, but the interest also, for after a negotiation had been carried on between the plaintiffs and defendant for a considerable time, it cannot be contended that the former are merely entitled to the deposit without interest, for they are clearly entitled to it by the express terms contained in the letter from the defendant's attorney of the 22d of *May*, 1816. The jury were perfectly warranted in having found a verdict for the plaintiffs, for there was sufficient evidence to support such finding. The defendant stood in the situation of principal from the time of sale, until the 18th of *February*, 1817, when the plaintiffs were first apprized, by letter, of the real name of the person to whom the estate belonged. The defendant, until that period, employed his own attorney. It is quite clear that if he had made interest of the deposit, as an auctioneer, he would have been liable in this action; but the circumstances of this case take it out of the general rule, and the plaintiffs are therefore entitled to recover to the amount found by the jury.

Mr. Serjt. *Lens*, in support of the rule, observed, that the verdict, found by the jury, was merely nominal, in order to bring the question before the court, as to whether the defendant, as an auctioneer, was under the circumstances, liable to pay any, and what interest, on the deposit received by him from the plaintiffs. He insisted that he was not liable to pay any interest, and that the present action was not maintainable, on the ground that he merely acted in the capacity of an auctioneer. If the

1817.



LEE

v.

MUNN.

1817.

LEE

v.

MUNF.

defendant had made interest on the deposit, and the plaintiffs had brought an action against him for money had and received, it is a question, whether interest might be recovered *quasi* damages; but even a principal is not liable to pay interest in all cases, but only under peculiar circumstances. There is a certain faith between the vendor and purchaser, as the one is to make out a good title, and the other expects to receive it. The deposit, left with the auctioneer, therefore, by the purchaser, is not to be considered as money lent, but merely a payment on account of a purchase to be completed thereafter. If a good title be not made out, both the parties are disappointed, but no blame can be imputed to either. There is nothing, in this case, which implies default or negligence, on the part of the defendant, to make him liable for interest. If, therefore, the plaintiffs be entitled to recover, it must be in the shape of damages, for the defendant's not having returned the deposit sooner; but as the defendant did not know whether the vendor could or could not make out a good title, he cannot be liable for interest, and more particularly so, as no demand was ever made on him to return the deposit. The cases, which have been previously determined, apply to principals only, and there is no decision to warrant the allowance of interest by an auctioneer to a purchaser of an estate from the time he received the deposit. The plaintiffs, in this case, are not entitled to recover by the general principles of law, for an auctioneer is no party to the original contract; and is merely to be considered as a stake-holder, for the money deposited with him, until it be determined whether the vendor make out a good title, in order to the completion of the purchase. In *Calton v. Bragg (a)*, it was held, that interest was not

allowable for money lent generally, without an express or implied contract; but in this case the money was merely to remain with the defendant, until it had been determined whether he should return it to the vendor or to the purchaser. Even if he should have made interest on it, he would have been bound to have had the money ready immediately on the completion of the purchase, or failure of the contract. As, therefore, there is no express contract to entitle the plaintiffs to recover interest, what damages have they really sustained? They had no means of making interest of this money themselves, as they paid it over to the defendant, under the idea that the completion of the purchase would be beneficial to their interests. The defendant, therefore, cannot be considered as answerable for damages, until it was apparent that he knew the contract could not be further proceeded in. Had he retained the money beyond that period, he might have been liable for damages, but as this was not proved, the action was not maintainable. An abstract question may be raised, whether an action may be maintained under the present circumstances, after a demand made for the deposit; but still, as it has not appeared that such demand was ever made, it is not necessary to consider its effect. The letters, in this case, obviate all doubt. It is true, that the principal is not named in them, but still the contract was kept open with the consent of the plaintiffs, for the express purpose of completing it. The parties, too, suggested modes of accommodation, and the letter of the 26th of *May*, 1816, which was about the time this action was commenced, shews that each of the parties was desirous that an ultimate arrangement should be effected. The name of the principal was not concealed in the correspondence. The plaintiffs must have been aware that the estate did not belong to the defendant, and it is nowhere

1817.  
 ~~~~~  
 LEE  
 v.  
 MUNN.

1817.  
 }  
 LEE  
 v.  
 MUNN.

intimated that they treated him as the principal, therefore they cannot say that they have been at any time entitled to damages, as not even the slightest imputation of misconduct can be cast on the defendant throughout the whole of the transaction.—The case of *Maberley v. Robins* was merely an action for money had and received; and the counsel for the plaintiff there consented to reduce the verdict, by striking off the interest. It therefore has never been decided whether an auctioneer is liable to pay interest on a deposit, in the event of the non-completion of the purchase; neither is it stated, in that case, whether there was an express or limited contract between the parties, or whether the defendant had made himself liable to damages after his authority had ceased. Here, the defendant acted as auctioneer throughout, and could not therefore be liable; and it is doubtful whether even the principal himself could be deemed so, as no blame could be imputed to him. In *Burrough v. Skinner (a)*, it is said, ‘that an auctioneer should not pay over the deposit until the sale be carried into effect, because he is considered as a stake-holder or depositary of it, and holds it for that purpose. The case of *Spurrier v. Elderton* is inapplicable to the present, as there, the plaintiff was an auctioneer, and the question was, whether he could recover the costs of an action against the principal as for money paid; but the court held, that he should have declared specially. This case, therefore, embraces a new question, and may be contradistinguished from those which have been previously determined; and, as in nearly all these cases, the action has been against the principal, the defendant, not only on principle and by the general rules of law, but under the peculiar circumstances

---

(a) 5 Burr. 2639.

of this case, and as no blame can be imputed to him, is not bound to pay the interest claimed by the plaintiffs.

Mr. Justice DALLAS.—As this case was tried before the Lord Chief Justice, the court, in consequence of the high respect which they consider to be due to him, are desirous to communicate with him before they deliver their ultimate opinion. If, however, an immediate decision were necessary, I should, myself, experience no difficulty on the question. If this case rested on the general question, whether an auctioneer is liable to interest on a sum deposited with him on the purchase of an estate, and the purchase is not completed, I might require time for further consideration. It has been decided, in many cases, that a principal is liable for interest, but it has never been held that a purchaser is entitled to recover interest from an auctioneer with whom money has been deposited; still, however, an auctioneer may, or may not be liable, according to the nature and circumstances of the case.—My brother *Lens* has argued this question with great propriety, by having traced the contract from its original source. The principal contracted to make a good title to the estate, on a given day, and on the faith of such undertaking, a sum of money was paid by the purchaser, and deposited with the defendant as the auctioneer.—It is true, that the purchaser has sustained an injury by having been kept out, not only of the benefits which he expected to derive from the completion of the purchase, but also from the advantages he might have received from the employment of the money deposited with the defendant. There is, however, a wide distinction between the situation of a principal and an auctioneer, for the latter merely engages to keep the money safely in his possession, as a stake-holder, and if the auctioneer should fail, he has a remedy against the principal.—Although the principal is liable for the deposit, still the

1817.

LEE

v.

MUNN.

1817.  
 {  
 LEE  
 v.  
 MUMF.

auctioneer was only bound to retain it ; and his liability, therefore, cannot attach until a demand be made on him for its repayment, and he is consequently only answerable from the time of such demand. His obligation is merely to retain it till a certain day, and if he do so after that day, a damage would accrue to the purchaser ; but even then, it is incumbent on the purchaser to prove that he had demanded the money. In this case, it does not appear that any demand was ever made ;—the contract was kept open between the parties, and different negotiations took place for carrying its completion into effect, and all these arrangements were a continuation of the original obligation. I, therefore, am led to conclude, on the special circumstances of this case, that the defendant is not liable to the plaintiffs for interest, and the principal ground which induces me to form this opinion is, that it does not appear that any demand for the re-payment of the deposit was ever made on him.

Mr. Justice PARK.—I feel no difficulty in saying that I do not consider the plaintiffs, in this case, entitled to interest, on the grounds which have been suggested by my brother *Dallas*.—This action was brought under special circumstances, and although the contract was kept open between the parties for a long space of time, still the plaintiffs, themselves, shewed no disposition to put an end to it ; and the defendant, therefore, cannot be considered liable. No case has been decided, as to the general principle, whether an auctioneer be or be not liable for interest on money deposited with him by the purchaser of an estate, on the vendor not being able to make a good title. In *De Bernales v. Wood*, the action was brought against the principal, and not the auctioneer. If it were necessary to decide the general question, in this case, as to an auctioneer's liability for interest, I should not feel myself justified in delivering my opinion, before I had



further considered the subject. In *Edwards v. Hodding* (a), it has been held, that an auctioneer is a mere stakeholder, and not to be considered as an agent for both parties. The plaintiffs here had a remedy against the principal;—it is therefore a great hardship that the defendant should be liable to interest on a sum deposited with him, from which it does not appear that he has derived any benefit, and as no demand has been made on him for its being returned, I think it unnecessary to deliver my sentiments more fully.

Mr. Justice BURROUGH.—An auctioneer can be considered responsible but on two grounds;—the one, where the contract between the vendor and purchaser is rescinded;—the other, where a demand has been made on him to return the sum deposited,—until then he holds it as a trustee. The case of *Edwards v. Hodding* was decided on the special ground, that the defendant, as the attorney for the vendors, was aware that there was a defect in the title, and that he should not have paid over the money to the vendor while that defect existed; and that he was therefore answerable to the purchaser for money had and received.

Rule absolute, to enter a verdict for the defendant (b).

1817.  
LEE  
v.  
MUNN.

---

(a) 1 Marsh. 377.—(b) The reporter has since learnt that Lord Chief Justice Gibbs concurred with the court in the above judgment.

*Wednesday, Nov. 19.*

The Court did not sit this day, in consequence of the funeral of her Royal Highness the lamented Princess Charlotte of Wales.

Saturday,  
Nov. 22.

REX, v. CURWEN, a prisoner.

A prisoner, in execution, on an attachment for non-payment of costs pursuant to an award, may be brought up at the instance of the prosecutor to deliver in a schedule of his effects under the compulsory clause in the statute of the 32 Geo. 2, c. 28, as that statute may be incorporated with the 33 Geo. 3, c. 5.

THE defendant, a prisoner, in the custody of the warden of the *Fleet*, under a writ of attachment for contempt, in non-payment of costs pursuant to an award which had been made a rule of court, was on a former day, in this term, brought up at the instance of the prosecutor, under the compulsory clause of the stat. 32 G. 2, c. 28, s. 16(a).

Mr. Serjt. *Heywood* and Mr. Serjt. *Copley*, for the prisoner, contended, that this court had no jurisdiction for this purpose, as the defendant did not come within the purview of the 32 Geo. 2, as the compulsory clause in that statute was not applicable to this case, since it did not extend to debtors who sought relief under an attachment, but only to such as were charged in execution.

(a) By which it is enacted, 'That if any prisoner, who shall be committed or charged in execution in any prison for any debt or damages not exceeding £100, besides costs, (since extended to £300, by the statutes 26 Geo. 3, c. 44, s. 2, and 33 Geo. 3, c. 5, s. 3.) shall not within three months next after every such prisoner shall be committed or charged in execution, deliver up his estate and effects to satisfy his creditors, they may compel such prisoner to be brought up, and deliver into court a schedule of his estate and effects, and the incumbrances affecting the same, upon oath, giving the prisoner twenty days notice of such intention, in order that his estate and effects may be divested out of him and assigned and conveyed as thereafter directed.'

The 33 *Geo. 3, c. 5, s. 4 (a)*, cannot avail in this case.—  
 The 32 *Geo. 2*, which contains a penal clause, must be construed strictly, for if a debtor do not deliver in a schedule of his effects, and make an assignment thereof for the benefit of his creditors, he is, by the 17th section of that act, liable to transportation for seven years. This, therefore, cannot apply to a prisoner in execution for non-payment of costs. Both these statutes were passed with two objects in view, the one for the relief of debtors, and the other to compel them to deliver up their effects for the benefit of their creditors; but the 33 *Geo. 3, c. 5*, cannot be extended to compel a prisoner for non-payment of costs, to deliver a schedule of his effects as a common debtor, under the compulsory clause of the 32 *Geo. 2, c. 28*.

Mr. Serjt. *Bisset, contra*, insisted that these statutes must be incorporated, for that by the 3d section of the 33 *Geo. 3*, the creditor was to have such remedy, in compelling the debtor to deliver up his effects, as was given by the 32 *Geo. 2*; and the former statute extends to prisoners in execution under an attachment for costs, on an award. On the construction of the whole of the statute of 33 *Geo. 3*, a prisoner cannot be entitled to relief, without being subject to the compulsory clause of the 32 *Geo. 2*.

The court, wishing to be acquainted with the practice of the *King's Bench*, in cases of this description, and the

1817.  
 ~~~~~  
 Rex  
 v.  
 CURWEN.

---

(a) Whereby, after reciting that persons are often committed on attachments for not paying money awarded under submissions to arbitration by or made rules of court, and, likewise, not paying costs duly and regularly taxed and allowed, after proper demands made for that purpose, and also upon writs *excommunicato capiendo*, or other process for, or grounded on the non-payment of costs or expences in causes or proceedings in ecclesiastical courts, it is declared and enacted, that 'All such persons are and shall be entitled to the benefit of this act, and subject to the same terms and conditions as are therein expressed and declared, with respect to prisoners for debt only.'

1817.  
 ~~~~~  
 Rex  
 v.  
 CURWEN.

construction which had been there put on these statutes, took time for the purpose of making inquiry, and,

On this day, Mr. Justice DALLAS delivered the following judgment :

In this case, it has been contended, that the prisoner is not within the compulsory clause of the 32 Geo. 2, c. 28, coupled with the 33 Geo. 3, c. 5 :—by the former, a debtor is bound, on request, to deliver in a schedule of his estate and effects, and to make an assignment for the benefit of his creditors, or to be transported for seven years. This is the case of a prisoner in execution for non-payment of costs under an award, and it is contended, that such a case is to be distinguished from that of a common debtor;—but there is no ground for such distinction. He is in execution for non-payment of costs, being so much withheld, that ought to be paid to the party entitled to it, and no general ground can be suggested, why his property should not be delivered up to be applied, as well to this purpose, as to every other;—still, however, it is said, we must look to the letter of the law: And with this view it will be fit to consider, *First*, the cases decided between the 32 Geo. 2, c. 28; *Secondly*, those since the latter statute; and, *Thirdly*, the two acts taken in connexion.—*First*, as to the 32 Geo. 2, c. 28, for the purpose of discharging a debtor, an attachment for non-payment of costs has always been treated as in the nature of a civil remedy, or of an execution in a civil suit.—*Rex v. Stokes (a)*, *Rex v. Myers (b)*, *Rex v. Pickerill (c)*. Next, as to the 33 Geo. 3, c. 5, which is declaratory, as well as enacting: and in substance it declares and enacts, that persons committed on attachments for non-payment of costs, are, and shall be entitled to the benefit of the act, on the same conditions as are in the act declared with respect to prisoners for debt only; and

---

(a) *Cowp.* 136.—(b) 1 *T. R.* 265.—(c) 4 *T. R.* 509.

in the third section, the creditor is to have such remedy by compelling a delivery up of the estate as is provided by the 28 *Geo. 2*, so that the 28 *Geo. 2*, is, in this respect, incorporated with the 33 *Geo. 3*, c. 5, and the effect of both is to put the common debtor, and the debtor in execution under an attachment for non-payment of costs, on the same footing. So it would be, on the construction of the statutes taken together, if no case had occurred either before or since. But in addition to those of previous occurrence, in *Trinity* term, 47 *Geo. 3*, *Henry Pearce*, a prisoner, in custody of the sheriffs of *London*, upon a writ of attachment for contempt in non-payment of money pursuant to an award, and of costs, was brought up at the instance of the prosecutor, under the compulsory clause in the general insolvent act of the 32 *Geo. 2*, and several times remanded in the course of that and the subsequent term. It does not appear, by the proceedings, that any objection was taken, that the defendant did not come within the provisions of that clause; but there appears to have been an objection made, that the defendant was not in a sufficiently sane state of mind to be examined. Looking therefore, to what has been decided, though this question, in terms, does not appear to have arisen to the sound construction of the statute, and to the sense and reason of the thing, we think the prisoner ought to be

Remanded.

It was then objected that the prisoner had not received sufficient notice, and that he should have been brought up within the first seven days of the term.—The court, however, over-ruled this objection, and ordered him to be brought up on the last day of this term, to be remanded until the first day of the next.—The prisoner, however, was not brought up in pursuance to such order, and no further application was made to the court.

Monday,  
Nov. 24.

FERRY, and another, v. WILLIAMS.

The defendant became the purchaser of a leasehold estate, sold by public auction. By the conditions of sale it was stipulated that the purchaser should immediately pay down a deposit, in part of the purchase money, and sign an agreement for payment of the remainder, within twenty-eight days from the day of sale, when possession should be given of the part in hand, and that the purchaser should have proper conveyances and assignments of the leases, without requiring the lessor's title on

THIS was an action of *assumpsit*, brought against a purchaser of a leasehold estate for the non-performance of an agreement. The first count of the declaration stated, that the plaintiffs caused to be put up and exposed to sale by public auction, a leasehold estate, consisting of dwelling-houses, buildings, and premises, with the appurtenances, subject to the following (amongst other) conditions of sale: "That the highest bidder should be the purchaser, who should pay down immediately a deposit of £25 *per cent.*, in part of the purchase money, and sign an agreement for payment of the remainder, within twenty-eight days from the day of sale, when possession should be given of the part in hand."

—That the purchaser should have proper conveyances and assignments of the leases at his own expence, without requiring the lessor's title on payment of the remainder of the purchase money: and that if such purchaser should neglect or fail to comply with the above conditions, that the deposit money should be forfeited; the

payment of the remainder of the purchase money. In an action of *assumpsit*, brought by the seller, for the non-performance of the conditions on the part of the purchaser, the declaration stated in the first count, that the plaintiffs gave the defendant possession, according to the conditions, and were also ready and willing to give him proper conveyances and assignments of the leases of the estate, on payment of the remainder of the purchase money; and the second count stated, that the plaintiffs contracted with the defendant to sell, and the defendant to purchase an estate, and that on the plaintiffs having promised the defendant to convey; he promised to accept the conveyance and pay the remainder of the purchase money in a reasonable time: That although the plaintiffs were ready and willing, and offered to convey and assign to the defendant, and although a reasonable time had elapsed for accepting the conveyance, yet that the defendant would not accept it, or pay the remainder of the purchase money.—On a motion in arrest of judgment, on the grounds that the plaintiffs had not set out their title, or tendered the conveyances to the defendant—*Held*, that the plaintiffs were not bound to set out their title, and that the allegation of their being ready and willing to convey, were equivalent to a performance of the conditions on their parts; but that, at all events, such objections could not be supported after verdict.

proprietor be at liberty to re-sell the estate by public or private sale, and the deficiency (if any) attending such second sale, with all incidental charges, should be made good by the defaulter. The declaration then averred, that the defendant was the highest bidder for, and purchaser of the estate at the sale, subject to the said conditions, for the sum of £2835, and paid down £200, in part of the purchase money, and signed an agreement for payment of the remainder, within twenty-eight days from the day of sale; and thereupon in consideration that the plaintiffs, at the request of the defendant, had promised the latter to perform the conditions of sale, on their parts, as vendors, the defendant promised the plaintiffs to perform the said conditions, on his part; and that although the plaintiffs did give the defendant possession, according to the conditions, and were also ready and willing to give and make to him proper conveyances and assignments of the leases of the estate, at the expence of the defendant, on payment of the remainder of the purchase money, according to the conditions, and well and truly performed, fulfilled, and kept the conditions, on their parts;—Yet, that the defendant did not nor would, pay them the remainder of the purchase money, or accept such conveyances and assignments as aforesaid, but wholly refused so to do, and failed to comply with the conditions, or complete or perform his contract of purchase or agreement, whereupon the plaintiffs re-sold the estate by public sale, for the sum of £1438:10s., and were put to great trouble and expence about the re-sale; and that on that second sale, there was a deficiency, which, with the duty, which was wholly paid by the plaintiffs, and all incidental charges, amounted to £1600, which deficiency was still unpaid, and unsatisfied by the defendant. The second count stated that the plaintiffs contracted and agreed with the defendant to sell, and the defendant contracted with the

1817.  
  
 FERRY  
 v.  
 WILLIAMS.

1817.

FERRY  
v.  
WILLIAMS.


plaintiffs to purchase, a certain leasehold estate of the plaintiffs, for the sum of £2835; and in consideration thereof, and that the plaintiffs had promised the defendant to convey to him the said last-mentioned estate, he promised the plaintiffs to accept the conveyance thereof, and pay them the purchase money in a reasonable time, then next following: That, although the plaintiffs were ready and willing, and offered to convey and assign to the defendant the said last-mentioned estate, and although a reasonable time for accepting such conveyance, and paying the said last-mentioned purchase money, had long since elapsed;—Yet, that the defendant did not nor would, within such reasonable time, or afterwards, accept or execute such conveyances and assignments as last aforesaid, or pay the purchase money, or any part thereof, or in any manner perform the said last mentioned contract for the purchase of the said last mentioned estate, whereby the plaintiffs not only lost, and were deprived of all the benefit, which would have accrued to them by the defendant's performance and completion of his said last mentioned contract, but were put to great expence in respect thereof, amounting to the sum of £200, and were also put to further charges amounting to £900, in and about the re-sale of the said last mentioned estate to another purchaser.—The declaration also contained counts for leasehold premises bargained and sold, and the common money counts. The defendant pleaded the general issue of *non-assumpsit*. The cause was tried before Mr. Justice *Park*, at the sittings at *Guildhall*, after the last term, when the jury found a verdict for the plaintiff.

Mr. Serjt. *Bast*, in the last term, had obtained a rule nisi, that this judgment might be arrested, on the ground that the declaration did not set out the plaintiff's title to the estate, and that there was no allegation of the conveyance and assignments of the leases having been pre-



pared and tendered. He cited the cases of *Luxton v. Robinson* (a), *The Duke of Saint Albans v. Shore* (b), *Phillips v. Fielding* (c), and *Martin v. Smith* (d).

Mr. Serjt. *Vaughan*, on a former day in this term, shewed cause, and observed, that the only question to be considered was, whether the plaintiffs had averred a sufficient performance of the contract, on their parts, in the declaration. Two objections have been raised, the *first*; that the plaintiffs had not set out their title therein; and, *secondly*, that they had not alleged that the conveyances and assignments of the leases had been tendered or prepared, but merely that they were ready and willing and offered to convey and assign. This latter objection will entirely depend on the question, whether this be a condition precedent, or, whether from the intention of the parties, the acts may be considered as mutual and concurrent, in which latter case the allegation of the plaintiffs of being ready and willing to give and make proper conveyances and assignments, is sufficient, without an averment of an actual tender. All the cases applicable to those covenants which may be considered independent and those dependent are collected by Mr. Serjeant *Williams*, in the case of *Pordage v. Cole* (e). The rules are there laid down, when it is necessary to aver performance in the declaration, and when not; it was in that case held that if it were agreed between *A.* and *B.*, that *B.* should pay *A.* a certain sum of money for his lands, on a particular day, that it was an independent covenant, and that *A.* might bring an action for the money before any conveyance of the land by him. In this case, the defendant signed an agreement to pay the remainder of the purchase money within a specified time, namely, 28 days from the day of sale; but no precise

1817.  
  
 FERRY  
 v.  
 WILLIAMS.

---

(a) *Doug.* 620.—(b) 2 *H. Bl.* 270.—(c) 2 *H. Bl.* 193.—  
 (d) 6 *K. R.* 555.—(e) 1 *Wms. Saund.* 380, n. 4.

1817.  
 FERRY  
 v.  
 WILLIAMS.

time was fixed when the conveyances and assignments of the leases were to be executed by the plaintiffs;—on the payment of the residue, the defendant would be entitled to the conveyances. These, therefore, are mutual covenants, and if either of them be precedent, it is that of the defendant, for the conveyances could not certainly be required, until the remainder of the purchase money had been paid. In *Morton v. Lamb* (a) Lord *Kenyon* held that wheretwo concurrent acts were to be done, it was sufficient for the party who sued the other for non-performance, to aver that he was ready to perform his part of the contract; and in *Rawson v. Johnson* (b), which was an action for the non-delivery of malt, and the plaintiffs alleged that they were ready and willing to receive the same, and pay for it according to the terms of sale, but that the defendant refused to deliver; it was sufficient, without averring an actual tender of the price agreed upon. So, in *Jones v. Barkley* (c), where it was agreed that some act should be performed by each of two parties, at the same time, that he who was ready and offered to perform his part, but was discharged by the other, might maintain an action against the other for not performing his part of the agreement. Here, it appears that the plaintiffs were ready to convey, but that the defendant refused to accept the conveyance, and thereby failed, on his part, to comply with the conditions of sale. An actual tender was therefore unnecessary, as the refusal amounts to a dispensation of what the plaintiffs might otherwise be compelled to have done. They averred that they were ready to convey, but that the defendant refused either to accept the conveyance, or to pay the purchase money. It must, therefore, be inferred, that the plaintiffs refused to tender the conveyance without the payment of the remainder of

---

(a) 7 T. R. 129.—(b) 1 E. R. 203.—(c) Doug. 684.

the purchase money. He also referred to *Kingston v. Preston*, cited in *Jones v. Barkley* (a). The plaintiffs have also alleged, that they gave the defendant actual possession of the premises. Having therefore executed the contract, in part, the defendant could not refuse to pay the remainder of the purchase money, and his having taken possession of the premises, is equivalent to an acceptance of the plaintiffs' title. In support of this proposition, he relied on the cases of *Boone v. Eyre* (b), and *Campbell v. Jones* (c). In *Wilks v. Atkinson* (d), which was an action for not delivering goods according to agreement, after demand made, it was considered unnecessary to adduce evidence in support of the averment, that the plaintiff was ready and willing to accept and pay for the goods. The defendant, here, being in possession of the premises, was estopped by the case of *Campbell v. Jones*, from saying that this was a condition precedent.—Still, however, these are mutual and concurrent acts, as each party relies on his own remedy.—[Mr. Justice *Burrough* mentioned the case of *Maxwell v. Sharp* (e), which was an action on an agreement to transfer stock, and the declaration was objected to, as it was not therein stated that there was an actual transfer of the stock; and Lord Chief Justice *Ryder* there said, that 'this objection to the declaration was 'founded upon a supposition that the transfer of the 'stock was a condition precedent, but that there were two 'mutual and independent contracts, for the breach of 'either of which an action would lie.' If the transfer of the stock were in the present case a condition precedent, the declaration would, nevertheless, be good, for as the defendant was ready to transfer the stock, he is, agreeably

1817.  
  
 FERRY  
 v.  
 WILLIAMS.

---

(a) *Doug.* 689.—(b) 2 *Sir W. Black.* 1312, S. C. 1 *H. Black.* 273, note a.—(c) 6 *T. R.* 570.—(d) 1 *Marsh.* 412.—(e) *Sayer*, 188.

1817.  
  
 FERRY  
 v.  
 WILLIAMS.

to what is laid down in the case of *Lancashire v. Killingworth* (a), as well entitled to the money agreed for, as if it had been actually transferred.]—The plaintiffs trusted to the personal security of the defendant, who now seeks to arrest the judgment after verdict, by which the declaration is aided, even if it should have been defective. As to the first objection, of the plaintiffs not having made out their title, it cannot be for a moment supported; for, by the conditions of sale, the defendant has altogether dispensed with it. In the case of *Phillips v. Fielding* it was otherwise, for the defendant there agreed to pay the remainder of the purchase money, on having a good title. The objections which have been raised are equally applicable to the first and second counts of the declaration, the latter of which is much stronger than the first, as the plaintiffs there averred, that they were ready and willing to convey to the defendant, but that the latter not only refused to accept or execute the conveyances, or pay the purchase money, but also that he would not, in any manner, perform the contract for the purchase, on his part. He referred to the case of *Provan v. Shipping* (b), where it was held that if an award were made by arbitrators, between A. and B., that A. should pay £10 to B., and that, in consideration thereof, B. should give a bond to A. to secure the enjoyment of land, or pay him £40, an allegation that A. had performed the award, on his part, was sufficient, without alleging payment of the £10; and this being moved in arrest of judgment, the court held, that although it was a condition precedent, yet, when the plaintiff said he had performed the award, on his part, it must be intended that he had performed it, and that it was good in substance, though not in form; and that, at all events, the defect of not shewing

---

(a) 1 Ld. Raym. 686.—(b) Cro. Car. 384.

performance was aided by the defendant's having pleaded to the issue. The averment of the plaintiffs, in this declaration, is sufficient, as an actual tender of the conveyances by them was not necessary, and they are, therefore, entitled to recover; and the general averment of their being ready and willing to convey the estate is equally so and cannot be taken advantage of, after verdict.

Mr. Serjt. *Best* and Mr. Serjt. *Copley*, in support of the rule, submitted, that the judgment should be arrested, as the jury had merely given a general verdict for the plaintiffs, who were not required by the conditions of sale, to set out the lessor's title; but still it was absolutely incumbent on them to set out their own. It did not appear, by the first count of the declaration, that the plaintiffs had any title;—they might, therefore, be total strangers to the contract, and might not be empowered to give the purchasers proper conveyances and assignments of leases. The averment of being ready and willing to make a proper conveyance, was insufficient, without shewing that they were entitled to do so. The second count was altogether bad, as the plaintiffs there merely promised to convey an estate to the defendant, and the conditions of sale are not even therein stated. The plaintiffs have therefore stipulated to convey an estate in both counts, and unless they had a good title to do so, such stipulation would be altogether ineffectual. A party who undertakes to convey an estate for money impliedly contracts that he has a good title, for the term conveyance, *en vi termini*, must imply that the person conveying had a good title;—as this was an absolute sale of a leasehold estate, it was equally necessary for the plaintiffs title to have been set out in that count. It has been contended, for the plaintiffs, that it must depend on the intention of the parties, whether this was a condition precedent, or whether the acts of the parties were mutual

1817.

FERRY

v.

WILLIAMS.


1817.  
  
 FERRY  
 v.  
 WILLIAMS.

and concurrent. The rules laid down by Mr. Serjeant *Williams*, in the case of *Pordage v. Cole*, are founded on technical rules; but neither of the principles there stated can support the plaintiffs' declaration, for it is there said, that when a day is appointed for the payment of a sum of money, and that day is to happen after the thing which is the consideration is to be performed, no action can be maintained for the money before such performance;—that where the mutual covenants go to the whole consideration on both sides, they are mutual conditions, and performance must be averred;—that where two acts are to be done at the same time, as where *A.* covenants to convey an estate to *B.* on such a day, and in consideration thereof *B.* covenants to pay *A.* a sum of money on the same day, neither can maintain an action, without shewing performance of, or an offer to perform his part, though it is not certain which of them is obliged to do the first act. If both parties agree to do a thing on a certain day, and one of them do it on a subsequent day, it could not be a condition precedent, because it would be contrary to the intention of both parties. Here, the defendant signed an agreement for payment of the remainder of the purchase money, within twenty-eight days from the day of sale; but can it be supposed that the plaintiffs were not bound to furnish him with a proper conveyance on that day? The defendant certainly could not be required to pay the remainder of his purchase money, until proper conveyances had been tendered and leases duly assigned to him by the plaintiffs. The cases of *Jones v. Barkley*, *Glasebrook v. Woodcote* (a), and *Goodman v. Nunn* (b), were cases of sale, in which the acts of the parties were to be performed at a given day. In *Campbell v. Jones*, two sums were to be paid at different periods,

---

(a) 8 T. R. 366.—(b) 4 T. R. 761.

and the court there held, that whether covenants were or were not independent of each other, depended on the reason of the case; and as the plaintiff there covenanted to instruct the defendant, they considered that such instruction must be gradual. That case is therefore wholly inapplicable to the present. In *Rawson v. Johnson*, which was an action on a contract, the plaintiff averred, that he was ready and willing to receive malt, and to pay for it according to the terms of sale, but that the defendant refused to deliver it;—he had therefore done every thing in his power for the completion of the contract.—So, in *Wilks v. Atkinson*, the plaintiff averred that he was ready and willing to accept and pay for the goods, and Lord *Kenyon*, in the former case said, ‘the acts were ‘to be done at the same time and place, and the plaintiff ‘went there, intending to do his part, but the defendant ‘staid away altogether, and it will not be necessary for ‘the plaintiffs in order to entitle them to maintain their ‘action, that they should have gone through the useless ‘ceremony of laying the money down, in order to take ‘it up again.’ That case, therefore, was decided under particular circumstances, inapplicable to the present.—In the case of *Maxwell v. Sharp*, the plaintiff had done all in his power to transfer the stock. In *Merrit v. Rane* (a), which was an action on an agreement for the transfer of stock, the plaintiff averred in his declaration, that he attended all the while the books were open, on the day on which the stock was to be transferred; but that the defendant did not appear to transfer; and the court there held, that if the defendant had been there, the plaintiff must have laid down his money, though not so as to part with it until transfer, and Lord Chief Justice *Pratt* there said, it had been so held in the case of *Turner*

1817.  
  
 FERRY  
 v.  
 WILLIAMS.

---

(a) 1 *Stran.* 458.

1817.  
 FERRY  
 v.  
 WILLIAMS.

v. *Goodwin* (a). In *Frivian v. Shipping* (b), it was undecided, whether it was a condition precedent, or not, and it was doubtful whether that case came on, on demurrer or in arrest of judgment.—The second count is clearly defective, and may be taken advantage of in arrest of judgment, for as the plaintiffs have totally omitted to state their title in that count, the promise alleged to have been made by the defendant, is merely an inference that such a sale had taken place; and this count does not even contain premises from which such an inference can be drawn, and Lord *Mansfield*, in the case of *Rushton v. Aspinall* (c), is stated to have said, that ‘a verdict will not mend the matter, where the gist of the case is not laid in the declaration, but it will cure ambiguity.’ In this count, the plaintiff’s title was not even adverted to. The case of *Phillips v. Fielding* was expressly in point; and it was there determined by the court, that it ought to have been averred in the declaration, that the seller actually made a good title, or a tender and refusal, and also to have shewn what title the seller had; and the court of *King’s Bench* in the case of *Martin v. Smith* (d) distinguished that case from *Phillips v. Fielding*, the latter of which must be overturned, in case the verdict given for the plaintiffs be allowed to remain. If a person contract to purchase an estate, he cannot be bound to take it, without a title being first tendered to him; and it must be therefore the most material part of the plaintiffs declaration to shew that they could make out a sufficient title. In *Luxton v. Robinson*, which was an action on an agreement to deliver possession for certain considerations, subject to a forfeiture on failure by either party, it was held, that the person who was to deliver possession,

---

(a) *Fortes*. 345. S. C. 10 *Mod.* 153.—(b) See *Viner’s Abr.* tit. *Condition*, T. pl. 10.—(c) *Doug.* 683.—(d) 6 *E. R.* 562.



could not sue for the forfeiture without shewing in his declaration a possessory title in himself, and Mr. Justice *Buller* there said, 'the plaintiff was to deliver possession; and, therefore, he ought to have shewn that he had a right so to do.' In *Glazebrook v. Woodrow*, Lord *Kenyon* said, 'the very substance of the consideration to entitle the plaintiff to receive the money, was the making the conveyance required, and that as the parties had stipulated for the conveyance and the payment at the same time, that the greatest injustice might be done, if the court were to hold otherwise.' That case cannot be distinguished from the present. In *Callonel v. Briggs (a)* it was held, that where one thing was to be the consideration of the other, although there might be mutual promises, still that performance must be averred and proved. It has not been even averred, by the plaintiffs, in the second count of the declaration, that they offered to convey within a reasonable time, but they merely stated that they were ready and willing to convey, and that although a reasonable time for accepting the conveyance had elapsed, that the defendant had refused to accept the conveyance and pay the remainder of the purchase money. As, therefore, neither of the special counts state the plaintiffs' title, nor a tender of the conveyances, they were clearly defective, and as in the latter it is not alleged that they were ready to convey within a reasonable time, it is evidently bad, and as the plaintiffs' title is the gist of the action, its omission is such a defect as not even to be cured by verdict.

*Cur. adv. vult.*

On this day, Mr. Justice *DALLAS* delivered the judgment of the court as follows:

This was a motion in arrest of judgment.—The de-

---

(a) 1 *Salk.* 112.

1817.  
FERRY  
v.  
WILLIAMS.

1817.

FERRY  
v.  
WILLIAMS.

claration consisted of two special, and the common counts: To the two former, objections have been raised.—The first count, in substance, states, that a leasehold estate was put up for sale, subject to certain conditions, of which one was, that the purchasers should have proper conveyances and assignments of leases, without requiring the lessor's title. What the buyer therefore did not stipulate to require, the lessor was not bound to state. The want of such an averment, therefore, constitutes no objection. It was next urged, that the tender of a proper assignment was not alleged; and true, it is not, in terms: but the allegation is, that he was ready and willing to give a proper assignment on payment of the remainder of the purchase money, according to the intent, tenor, and effect of the agreement; but that the defendant refused to accept of such assignment, and to perform his agreement according to such intent and meaning. Now, the rule is clear, that if performance be prevented by the act of one party, it is equivalent to a performance by the other;—and, applied to this case, it makes an end of the objection. There is then a substantial right of action on the record: whether so formally pleaded, as to be good on demurrer, it is not necessary now to consider. It is enough to say, that this motion is in arrest of judgment, when the omission of that which is form, and even of substance, shall be aided by verdict, if without proving it at the trial, the plaintiff would not have succeeded. The second count differs from the first, in these respects;—nothing is stated of not requiring the lessor's title. But the agreement set forth is, that the one shall assign, and the other accept. It then avers, not merely being ready and willing, as in the former count, but an actual offer to convey and assign, and a refusal by the defendant to accept. To this count it is objected;—first, that there is no title specially set forth;—secondly, that title is not

even generally alleged; and thirdly, that there is no averment of the actual tender of any conveyance or assignment: and, true it is, that title in the lessor is not alleged. It becomes therefore unnecessary to consider the distinction between title specially set forth, and title generally alleged, for it is not here even generally alleged. If, under the facts of this case, such allegation were necessary, and the want of it bad on demurrer, we are now not to decide on demurrer, but on a motion in arrest of judgment,—and to this ground our consideration must be confined. And this makes it unnecessary to go into the various cases which have been cited, every one of which, if it were requisite to examine, is to be distinguished in many other respects from this;—but for the present purpose, it is enough to distinguish them in this respect only;—they were all cases on demurrer. I need scarcely say they depend not only upon different, but upon opposite principles; on demurrer, in favour of correct pleading, every objection is to be strictly considered. After verdict, matter, whether of form or substance, is to be aided by the verdict in favour of the justice of the case. The authorities to have been cited, on the part of the defendant, should have been after verdict; but of such, as are applicable to the point, not one has been brought forward. Confined, therefore, to the point of motion in arrest of judgment, it becomes necessary to refer to the agreement and breach, as stated in this count of the declaration. The contract alleged, is an agreement by the defendant to purchase, and by the plaintiffs to assign and to convey a certain leasehold estate of them, the plaintiffs, and after verdict it must be taken that the contract alleged was proved. Nothing is said, as to title or right to convey; but it is insisted that in legal construction, such an agreement, *i. e.* to assign and convey, imports a right to assign and convey. And be

1817.

  
 FERRY  
 v.

WILLIAMS.

1817.  
 FERRY  
 v.  
 WILLIAMS.

it so, for the purpose of the argument,—for if such be the construction which the law will put upon the contract, it must be taken that the assignment offered was of such a description. It is sufficient to set forth in the declaration the agreement in the terms in which it exists. The same construction must be applied to the contract, and to the statement of the contract in the declaration;—this is done in the present case. And supposing it necessary to prove, under such an agreement, an offer legally to assign, it must be taken, after verdict, that this was proved on the trial; inasmuch, as without such proof, in the present view of the case, the plaintiffs could not have recovered. As to the remaining objection, the want of an actual tender, it will be sufficient to say, that the objection is weaker in this respect, than as applied to the former count; for here, an actual offer to convey is alleged, not merely that they were ready and willing,—and a refusal by the defendant to accept. It will be sufficient therefore to refer to what has been said before, as applying, if it were necessary, with more force to this count, than to the former. The case seems to be sufficiently clear: but if any illustration were wanted, it may be derived from the last case on this subject decided in this court. In *Mason v. Corder* (a), it was urged in arrest of judgment, in an action upon an agreement to assign a lease, that the plaintiff should have averred and proved not only that he was ready to make a good title, but that it was in his power to have done so.—A new trial was granted upon the merits, so that the case did not turn on the point, whether the judgment ought to be arrested. But, in delivering the judgment of the court, my Lord Chief Justice said, ‘the action cannot be supported, unless the plaintiff shew that he was ready and able to

---

(a) 2 *Marsh.* 332.

' make an assignment, with the consent of the original  
 ' lessor in writing, which may be done on a future occa-  
 ' sion, but does not appear to have been proved on the  
 ' trial.' Now, it could not be done on a future occasion, if  
 the want of such an averment would have excluded such  
 proof, nor could it, on the same ground, have been  
 proved on the trial had ; and yet, for the want of such  
 proof, the new trial was ordered. Without, there-  
 fore, being in terms averred, the ability to make is in-  
 volved in the averment of being ready and willing to  
 make an assignment and having tendered and offered to  
 assign, and becomes matter of necessary proof on the  
 trial, to enable the plaintiff to recover. And the rule  
 being, that whatever is sufficiently alleged to let in proof,  
 and without which proof the plaintiff must have failed,  
 will be intended after verdict to have been proved : such  
 intendment must be made in the present case, and, con-  
 sequently, the plaintiff is entitled to recover.

1817.  
 {  
 FERRY  
 v.  
 WILLIAMS.

Rule discharged (a).

---

(a) See *Levy v. Lord Herbert*, ante, 56.

Tuesday,  
Nov. 25.

HARTLEY v. HODSON (a).

A bailable, and not a *testatum capias*, was issued into *Durham*, and signed by the filacer for that county. The defendant was arrested, and put in bail as upon a *testatum*. A declaration was afterwards delivered, in which the venue was laid in *Lincolnshire*. A recognizance of bail was entered into in *Middlesex*, and a declaration on such recognizance was afterwards delivered, to which the defendant pleaded. On a motion to amend the entry of the recognizance from *London* to *Durham*, — *Held*, that the defendant having submitted to the arrest, and put in and got bail allowed, as upon a *testatum capias*, had waived the irregularity, and the court refused to interfere, but left the party to his ordinary remedy, and expressed their opinion that such writs ought not to issue in future.

In this case, a bailable, not a *testatum capias*, was issued into the county palatine of *Durham*, and signed by the filacer for that county. The defendant was arrested, and put in bail as upon a *testatum writ*, as appeared by the bail-piece, which the defendant got allowed and filed. The declaration was afterwards delivered in the original action, in which the venue was laid in *Lincolnshire*. So long since as 1815, judgment was signed for want of a plea, and final judgment obtained on the 22d day of *April* in that year. A declaration on the recognizance was afterwards delivered, to which the defendant pleaded three pleas, and the cause came to issue in this term.

Mr. Serjt. *Hullock*, on a former day in this term, obtained a rule *nisi*, that the entry of the recognizance should be made conformable to the facts, and that, in the mean time, all further proceedings should be staid. His motion was grounded on the following objections, namely, that there was no cursitor or filacer for the county palatine of *Durham*, and that an original *capias* could not issue into that county:—That the recognizance of bail, upon which the plaintiff was proceeding, was wrongly entitled in *London*, the venue in the original action being laid in *Lincolnshire*, and the final judgment obtained against the defendant in this action was in that county:—That no recognizance of bail had been made when the defendant pleaded, nor until the judgment signed in this action had been set aside:—that no *capias ad satisfaciendum* against the principal had been duly returned in this court to the time when an application was made to set aside the judg-

(a) For the previous proceedings in this case, see *ante*, 490.

ment;—that the recognizance of bail was entitled in *Middlesex*, where alone it could be entitled, because the court there sit, and to which it is ultimately returned. He observed, that if these proceedings were sanctioned, it would have the effect of allowing an original *capias* to issue into a county palatine.

Mr. Serjt. *Blisset*, on a subsequent day, shewed cause: he said, that the object of the motion was to alter the entry of the recognizance on the roll from *Middlesex* to *Durham*, being the county into which the writ had originally issued. There is a filacer for the county palatine of *Durham*, and a *capias* is sued out of his office, and forms no part of the record. The cursitor furnishes the original writ, who is not to be applied to in *Durham*, but in the county in which the venue is laid. As to the question of a writ's issuing into a county palatine, and that the venue must be laid where the writ is executed, there is no distinction between a *capias* and a *testatum capias*. The operation of each is the same, and the only difference is, that in the *testatum*, a reference is made to an antecedent writ into some other county. If, therefore, a *capias* cannot issue into a county palatine, it must also follow, that a *testatum* cannot. The venue here is laid in *Lincolnshire*, where the cause of action arose, and where both the plaintiff and the defendant at that time resided. It is not necessary to lay the venue in the county to which the *capias* issues, for, by a rule of this court (a), it is ordered, that where the defendant is arrested by virtue of a *capias ad respondendum* in any county, and bail be put in thereupon, the plaintiff may declare in a different county, without its being deemed a waiver of the bail. In the case of *Jackson v. Hunter* (b), it was held, that if a writ of

1817.

HARTLEY  
v.  
HODSON.

(a) *Mil. 22 Geo. 3.*—(b) 6 T. R. 71.

1817.  
 HARTLEY  
 v.  
 HODSON.

*testatum special copias*, issued from the court of *King's Bench*, were directed immediately to the sheriff of *Durham*, without stating the intervention of the bishop, he was bound to execute it, and that a bail-bond taken on the arrest was legal; and in *Chapman v. Maddison* (a); an attachment was granted against the officer of the bishop of *Durham*, for not returning a writ of *latitat* directed immediately to him. On authority, as well as principle, therefore, bail having been put in, and entered into a recognizance, and pleaded to the action, is a complete waiver of the informality of the *copias*, if any such existed. In *Shuttle v. Wood*, referred to by Lord *Ellenborough* in the case of *Coxeter v. Burke* (b), it was stated that the recognizance in this court binds as a record from the first caption, and before it is filed at *Westminster*; and that, therefore, where it was taken by a judge of this court, in which case a special entry was made of its being so taken on a day certain, and was afterwards filed at *Westminster*, a *scire facias* lay on it in *London*, where it was so taken, or in *Middlesex*, where it was filed, and became a record in court. At all events, therefore, there is no occasion to alter the recognizance, as it is not necessary to entitle it where it issues, but where the court sit; and even if the writ had been irregularly issued in the first instance, still such irregularity is waived by the subsequent conduct of the parties.

Mr. Serjt. *Hullock*, in support of the rule, insisted, that according to strict legal principles, the whole of these proceedings were irregular.—A writ need not issue where the venue is laid, for there are only two writs, either actual or supposed. A *testatum copias* is founded on a supposed original, and is only necessary where the party resides in another county than that in which the venue is

(a) 2 Stran. 1089.—(b) 5 B. & R. 462, 1101.



laid : but the venue must be laid where the original writ actually issued, or where it may have been supposed to have issued. The case of *Jackson v. Hunter* is wholly inapplicable to this question, as here the parties resided in *Durham*. A bailable *capias* cannot issue into a county palatine, because it is an original writ ; and the venue being laid in *Lincolnshire*, clearly shows that it was irregular. As, therefore, the venue could only be laid where the original issued, and as an original issued into *Durham*, contrary to legal practice, the venue should have been laid there also ; but the plaintiff has laid it in *London*, for the purpose of obtaining a privilege to which he is not entitled, and the rule must therefore be made absolute.

1817.  
HARTLEY  
v.  
HODSON.

*Cur. adv. vult.*

On this day, Mr. Justice DALLAS delivered the following judgment:—

Without saying any thing of the regularity or validity of the writ which issued in the first instance, or what would have been the effect, if the defendant had then moved to be discharged, or to have the process set aside as irregular or void, it is enough to state, that not having done so, but having submitted to the arrest, and put in bail, and having himself got the bail allowed as upon a *testatum capias*, and the bail being bound to look to the conduct of their principal on the single ground of length of time, but still more as connected with these facts, we think this application is not to be favoured. The case of *Jackson v. Hunter*, referred to by my brother *Blosset*, was not a case in which the proceeding was originally void, the writ being a *testatum capias*, but being directed to the sheriff without the intervention of the bishop, the court held it to be irregular only ; and so far as to the main point, that case does not apply. But in delivering his

1817.  
  
 HARTLEY  
 v.  
 HODSON.

opinion, Lord *Kenyon* says, 'It is not necessary to determine whether the defendant in the original cause could or could not have set aside the process for irregularity by motion;' and he adds, with respect to the defendant, 'no injury was done to him by a course less circuitous, and less expensive.' So here, no injury was done to the defendant, whether in form a *capias* issued in the first instance, instead of a *testatum capias*; and this is not an application on the part of the bishop. Even if it had been such, from the case of *Chapman v. Maddison* it will be seen in what light these applications are considered.—A *latitat* was offered to the proper officer of the bishop of *Durham*, and a demand made upon him to issue the usual mandate for an execution of the process. The officer refused to receive it, upon pretence that the process of the *King's Bench* would not run into the county palatine; and upon motion against him for an attachment, a long argument was made by the bishop's counsel, to shew that no process would run there but from the *Exchequer*; but the court, on consideration, said, that whatever might be the case, when the question came before them properly upon a claim of consuance, or plea to the jurisdiction, yet they would never endure that the officer should refuse to receive their process. I mention this only for the purpose of shewing the light in which applications of this sort are considered. And in *Hart, assignee, v. Weston (a)*, on an objection somewhat similar to the present, and which was also in an action of debt on a bail bond, the objection being to the writ, which was stated by the declaration to have been sued out on the 23d of *February*, the court then sitting, which was impossible, for the court could not sit out of term, even though on demurrer. Lord *Mansfield*

---

(a) 5 Bur. 2586.

said, 'this is a catching objection: the justice of the case is plain, and an objection that tends to obstruct that justice is entitled to no favour.' Such, we think, is the tendency of the present objection; and considering length of time, the object of the application, and all other circumstances, we decline interfering, leaving the party to his ordinary remedy, whatever it may be. At the same time, we think it right to add, that such writs ought not to issue in future.

1817.  
HARTLEY  
v.  
HOBSON.

Rule discharged.

GIBSON v. BRAY and another.

Tuesday,  
November 25.

THIS was an action of trover, brought to recover certain shawls and lace from the defendants, who were the assignees of one *Markham*, a bankrupt. The defendants pleaded the general issue of not guilty. At the trial of the cause before Lord Chief Justice *Gibbs* at *Guildhall*, at the sittings after last term, it appeared that in the month of *November* last, the plaintiff's traveller from *London* was directed by the bankrupt, a shopkeeper at *Sunderland*, to send him a quantity of lace for inspection and approval, representing that he had a customer requiring goods of that description. On the 11th of that month, the plaintiff selected some laces, which were Goods were sent from *London* to *Sunderland*, upon sale or return, and a letter inclosing an invoice requested the buyer to return such of them as were not approved by him in as short a time as possible. The goods arrived at the shop of the buyer on the evening of the 13th of *November*, and on the following day he committed an act of bankruptcy. In an action of trover, brought by the seller against the assignees to recover these goods,—*Held*, that they did not pass to such assignees under the statute 21 *Jac.* 1. *cap.* 19, s. 11, as the bankrupt should have been allowed a reasonable time to have selected such goods as he was disposed to retain.

1817.  
GIBSON  
v.  
BRAY.

packed in a box, and sent directed to the bankrupt by the *Newcastle* coach. On the same day, an invoice was sent to the bankrupt by the post, specifying the description of the laces, and stating the bankrupt to have bought them of the plaintiff; but they were not carried out as in the case of a sale, but merely the price of the different goods was affixed to each particular sort. This invoice was inclosed in a letter to the bankrupt, requesting him to return such goods as were not approved by him, in as short a time as possible. The goods arrived at the shop of the bankrupt on the evening of the 13th of *November*, and on the following morning he committed an act of bankruptcy. A commission was accordingly issued against him, the docket having been struck on the 18th of *November*, and the commission sealed on the 21st; and the day of the act of bankruptcy, on which the party was declared a bankrupt, was the 15th of the same month. The box containing the lace remained in the bankrupt's shop for some weeks unopened, and was kept perfectly distinct from his stock. The defendants were chosen assignees under the commission: and on the plaintiff's applying to them, and demanding a restoration of the lace, he, on the 3d of *February*, 1817, received a letter from them, stating that the goods had been received into the bankrupt's stock prior to the act of bankruptcy, and that, therefore, they could not be given up, as they had been then sold with the bankrupt's stock; upon which the present action was brought. His Lordship left it to the jury to determine whether or not the goods were so long in the possession of the bankrupt, as to afford him an opportunity of making his election, either to accept or refuse them. The jury found a verdict for the plaintiff, but his lordship gave the defendants liberty to move to set it aside, or to enter a nonsuit.


Mr. Serjeant *Vaughan*, on a former day in this term, having accordingly obtained the rule, observed, that the only questions were, *first* whether the goods were sent on sale or return, and *secondly*, whether they were so long in the possession or disposition of the bankrupt, as to pass to the defendants, as his assignees, under the statute 21 *Jac.* 1. c. 19. s. 11. He cited the cases of *Livesay v. Hood* (a) and *Neate v. Ball* (b).

Mr. Serjeant *Best* now shewed cause, and observed, that the cases cited in support of the rule were inapplicable, as this could not be considered a question of goods sent upon sale or return, under circumstances similar to these cases, as in the one the party had sold a part of the goods, and in the other, had kept possession of them for nearly a month. Here, the goods only arrived the day before the act of bankruptcy was committed, and it does not appear that the bankrupt exercised any discretionary judgment, as to accepting or refusing them. On the contrary, he did not even open the box in which they were contained. The morning after their arrival, he committed an act of bankruptcy, and from that moment he had no power over the disposition of the goods. The case of *Atkin v. Barwick* (c), was sufficient to shew that the plaintiff was entitled to recover back the goods from the assignees, as the property was not altered by the delivery, and the bankrupt did not agree to accept them. Although the invoice expressed interms, that the bankrupt had purchased goods of the plaintiff, still, as their prices were not carried out, and such invoice was inclosed in a letter, requesting him to return such of them as should not be approved of, in as short a time as possible, is sufficient to shew that this was a case of sale or return. It was there-

1817.  
GIBSON  
v.  
BRAY.

---

(a) 2 *Camp.* 83.—(b) 2 *E. R.* 117.—(c) 1 *Stran.* 165.

1817.  
  
 GIBSON  
 v.  
 BRAY.

fore clear, that the bankrupt had a discretion to select those goods which suited him for sale, and to return those which did not; until he had made such a selection, they could not be considered as in his possession within the terms of the statute 21 *Jac.* 1, for it is necessary for a bankrupt, not only to have goods in his possession, but also to have the order and disposition of them.

Mr. Serjeant *Vaughan*, in support of the rule, insisted, that as the goods were in the possession of the bankrupt before he committed an act of bankruptcy, the defendants, as his assignees, were entitled to retain them. Although the box remained unopened, still the goods were subject to the order and disposition of the bankrupt. He was empowered to do any thing he pleased with them. The length of time the goods remained in his possession previously to his bankruptcy, was immaterial, as they were completely under his order and disposition from the moment of their arrival, and he might have immediately exercised a power to determine what part he would retain, and what return. If the box had been opened, it is quite clear that it could not have been claimed by the seller. In cases of sale and return, there is a reciprocity of trust, equally binding on both parties. Although the priors were not carried out in the invoice, still the assignees might confirm the contract, as the goods were in the possession of the bankrupt before his bankruptcy. The case of *Liveray v. Hood* may be assimilated to the present, as it was there held, that goods in the hands of a retail dealer upon sale or return, passed to his assignees under a commission of bankrupt against him. As the goods here were in the possession of the bankrupt previous to his bankruptcy, they might so far be considered to be in his order and disposition, as to be within the statute of 21 *Jac.* 1, one of the principal objects of which was, to meet a case of this description.

Mr. Justice DALLAS.—There is a great deal of fallacy in the argument of my brother *Vaughan*. He has supposed it sufficient to bring this case within the 11th section of the 21 *Jac.* 1. c. 19, if goods have even been in the possession of a bankrupt for a moment. But the object of that statute is to prevent frauds and deceits practised by bankrupts over their creditors, and to prevent false credits, whereby others may be imposed upon. If there be an actual possession, it is sufficient; and on this ground it has been decided, that goods in the possession of a factor or trustee, are within that section; but there are cases which may form an exception to the general rule. If the property of the goods be in another, and not in the order and disposition of the bankrupt, such goods do not come within the statute. The construction contended for by the defendants, would render the eleventh section of the statute of *James* of too extensive a nature. In order to bring it strictly within that statute, it appears that the goods must be in the possession of the bankrupt, by the consent of the owner, who may take upon himself the sale, disposition or order of them, as owner. The bankrupt must therefore have an absolute power of disposal and sale. What are the circumstances of this case? The goods were not sent, as in *Livesey v. Hood*, on a continued dealing between the parties, as there the plaintiff and bankrupt settled their accounts monthly, and the latter was to pay for the articles sold at the invoice price, deducting £5 *per cent.*, and at the time of the bankruptcy, part of the goods had been disposed of by the bankrupt; but here, the goods were received by the bankrupt on the 13th of *November*, and the seller did not divest himself of his property in them, but it was optional in the bankrupt to have returned the whole of them, and a reasonable time should have been allowed him to have made a selection of such of the goods as he wished to re-

1817.  
 GIBSON  
 v.  
 BRAY.

1817.  
 {  
 GIBSON  
 v.  
 BRAY.

tain. My brother *Vaughan* has contended, that the bankrupt might have sold the goods the moment he had received them: if he had done so, they would have been then under his order and disposition. But this is a case of sale and return; and, by the nature of dealing between parties in cases of this description, the purchaser is allowed a reasonable time either to keep or return. It cannot be contended that a person who receives goods in the evening of one day, and commits an act of bankruptcy on the following morning, can have had them a reasonable time in his possession for the purpose of selecting such as he was disposed to retain. I am therefore of opinion, that the plaintiff is entitled to recover.

Mr. Justice PARK.—I perfectly concur with my brother *Dallas*; but if this decision had either the effect of overturning the statute of *James*, or of infringing on the cases of *Livesay v. Hood*, and *Neate v. Ball*, it might require some consideration whether these goods were or were not in the possession of the bankrupt; but from the statement of the facts, I think there can be no doubt. The bankrupt lived at *Sunderland*, and the goods were sent to him from *London*, upon sale or return. That circumstance, therefore, brings this case within that of *Livesay v. Hood*; but the goods were not received by the bankrupt until the afternoon of the 13th of *November*, and on the following morning he not only committed an act of bankruptcy, but never re-opened the shop on his own account. He therefore had no power of exercising an option what goods he should retain, and what return. In *Neate v. Ball*, and *Livesay v. Hood*, the court considered the time the goods had remained in the possession of the bankrupt, and Lord *Kenyon*, in the former case, said, ‘that the bankrupt must decide immediately whether he would accept or return the goods; but he received them into his warehouse on the 19th of *February*, and there



'kept them as his goods until the 4th or 5th of *March*.' In *Livesay v. Hood*, the goods had been in the possession of the bankrupt for nearly a month; and Mr. Justice *Lawrence* there said, 'they appeared to the world as his property, and this reputed ownership was calculated to gain him a delusive credit, which it was the object of the statute of *James* to prevent.' Here, there is no appearance of such delusive credit; for the bankrupt had not even approved of the goods, although he might have had the power to have sold or disposed of them. It does not seem that he ever had such power; for they only came into his possession on the eve of his bankruptcy. I therefore think that the circumstances of this case go far beyond those of *Neate v. Ball*, and *Livesay v. Hood*; and that as this decision will not infringe either on the statute or these cases, the plaintiff is entitled to retain his verdict.

Mr. Justice BURROUGH.—In the case of *Horn v. Baker* (a), all the previous decisions which are applicable to this case are collected and duly considered. This is merely a simple question between the owner of goods and the bankrupt. By the terms of the letter inclosing the invoice, it is quite clear that they were furnished by the seller to the bankrupt upon sale or return, and the latter was requested to return such goods as he did not approve in as short a time as possible. He was certainly, therefore, to be allowed a reasonable time for making his selection. He might either have returned all, or a part of the goods. He received them but the evening before he committed an act of bankruptcy, and after that event, he exercised no further controul over them. Even, by the terms of the letter, he must be allowed a reasonable time; and as the goods were in his possession only a few hours, I think there is no ground to say that they

1817.  
GIBSON  
v.  
BRAY.

---

(a) 9 E. R. 215.

1817.  
 ~~~~~  
 GIBSON  
 v.  
 BRAY.

passed to his assignees under the statute of 21 *James* 1, c. 19, and that consequently the decisions of my brethren *Dallas* and *Park* are perfectly correct.

Rule discharged.

Tuesday,  
 Nov. 25th.

ROWE, and another, assignees, v. PICKFORD and another.

A trader, in *London*, was in the habit of purchasing goods at *Manchester*, and exporting them to the *Continent* shortly after their arrival in *London*. The goods consigned to him remained in the waggon-office of the defendants who were carriers, until they were removed by his agent, for the purpose of being shipped.—*Held*, that such trader, having become bankrupt, the assignees were entitled to recover goods deposited with the defendants before the bankruptcy, and that the consignee had no right to stop them in *transitu*, as the trader had no warehouse of his own:—*Held*, also, that the *transitus* of the goods was at an end on their arrival at the waggon-office.

THIS was an action of trover brought by the plaintiffs, assignees of *Lange*, a bankrupt, to recover six bales of twist, delivered to the defendants, as carriers, at their warehouse in *Manchester*, on the 9th and 12th of *August*, 1816, addressed to the bankrupt in *London*.—The cause was tried before Mr. Justice *Dallas*, at the sittings at *Guildhall*, after the last term, when the plaintiffs proved the petitioning creditor's debt; the trading of the bankrupt; his committing an act of bankruptcy, on the 16th or 17th of *August*, 1816, as well as their title under the commission, subsequent to such act of bankruptcy: They further proved, that the bankrupt was in the habit of purchasing *Manchester* goods, through a person by the name of *Chappe*, and of exporting them to the *Continent*, on, or shortly after their arrival in *London*;—that he had no warehouse of his own in *London*, and that the goods consigned to him remained in the waggon-office of the defendants until they were removed by the bankrupt's agent, for the purpose of being shipped:—That the bankrupt always received notice, from the defendants, of

the arrival at their warehouse, in *London*, of any goods addressed to him; and that such goods remained there until an opportunity for shipping them occurred, when an order to remove them was given by the bankrupt, to his shipping agents, together with the note left with the bankrupt, containing information of their arrival:—That on the 14th of *August*, the clerk of the bankrupt received a notice from one of the defendants' porters, of the arrival of two of the bales in question, when he went to the warehouse of the defendants, saw the bales, and informed the warehouseman that he should give an order to the bankrupt's agent, to come for them as usual:—That on the 17th of *August*, a similar notice was given by the defendants, as to the arrival of the four other bales, and that on the afternoon of that day, the clerk of the bankrupt went to their warehouse, and saw them, but did not give any directions:—That on the 18th of *August*, he met the warehouseman, and told him not to let the goods go without order:—It was also proved, that the carriage of the goods had not been paid, and that the bankrupt's agent always paid the carriage when he took them away.—On the 19th, the defendants received an order from the consignor, not to deliver the goods to the bankrupt, but to Messrs. *Leibman & Co.*, which the defendants accordingly did. The plaintiffs, as assignees of *Lange*, the consignee, having afterwards demanded them, and their order not being complied with, they commenced the present action.—It was contended, for the plaintiffs, that these goods could not be stopped *in transitu*, and submitted that it was determined on the arrival of the goods at the warehouse of the defendants, who, on the other hand, insisted that the goods were *in transitu* when the consignor gave the notice for the non-delivery of them to the consignee. A verdict, however, was found for the plaintiffs, damages £838 7s.,

1817.

Rowe

v.

PICKFORD.

1817.  
 Rowe  
 v.  
 PICKFORD.

costs forty shillings, with liberty for the defendants to move to enter a nonsuit, or that a new trial should be granted.

Mr. Serjt. *Lens*, on a former day in this term, accordingly obtained a rule *nisi*, and relied on the case of *Hunter v. Beal* (a), the facts of which he said were precisely similar to the present, and it was there held by Lord *Mansfield*, that there must be an actual possession by the bankrupts. He also referred to the cases of *Mills v. Ball* (b), and *Ellis v. Hunt* (c).

Mr. Serjt. *Best* was on this day about to shew cause, when the court observed that this case must be governed by those of *Leeds v. Wright* (d), and *Scott v. Pettit* (e), in the latter of which it was held, that 'where a trader had 'no warehouse of his own, but used that of his packer, for 'receiving goods consigned to him, the *transitus* of such 'goods was at an end, upon delivery of them to the packer.' That the case of *Hunter v. Beal* was not only distinguishable from the present, but also weakened by subsequent decisions; and the impression on the mind of Lord *Ellenborough*, in the case of *Dixon v. Balduen* (f), appears to have been against that determination. In the case of *Richardson v. Goss* (g) Mr. Justice *Chambre* said, 'that 'he was strongly inclined to think, that if a man were 'in the habit of using the warehouse of a wharfinger, 'as his own, and make it the repository of his goods, 'and dispose of them there, that the journey would be 'at an end when the goods arrived at such warehouse,' and in the case of *Scott v. Pettit* (h), Lord Chief Justice *Alvanley* said, that 'he perfectly coincided with Mr. 'Justice *Chambre*, in the opinion he had intimated, in the

---

(a) 3 T. R. 466, n. — (b) 2 B. & P. 457. — (c) 3 T. R. 464. —  
 (d) 3 B. & P. 320. — (e) 3 B. & P. 469. — (f) 5 E. R. 184.  
 — (g) 3 B. & P. 127. — (h) 3 B. & P. 478.

'former case.' Both these latter cases are recognized by the court of *King's Bench*, in *Dixon v. Baldwin* (a), and are there established by Lord *Ellenborough* (b). As, in this case, it was proved that the bankrupt had no warehouse in *London*, but that the goods always remained at the defendants' waggon-office, until they were removed by the bankrupt's agent, for the purpose of being shipped, the rule must be

1817.  
 ROWE  
 v.  
 PICKFORD.

Discharged.

(a) 3 E. R. 181.—(b) *Id.* 185.

### HEMMING v. PLENTY.

Wednesday,  
 Nov. 26th.

MR. Serjt. *Best* opposed the justification of bail, on the ground that one of them did not reside in the house where he was described in the notice.—The bail said that the house was kept jointly, by himself and his partner, who carried on business as soap manufacturers; that the rent and taxes were paid by them jointly, and that his partner resided in the house; but that he himself lodged at the distance of a mile and half from it.

The court permitted a person to justify as bail, although he did not reside in the house in which he was described in the notice.

The court, after some deliberation, permitted the bail to justify, and Mr. Justice *Dallas* observed, that if a person thus situated was not allowed to do so, it might possibly tend to the rejection of many responsible persons living at a distance from the house in which their business was carried on.

Thursday,  
Nov. 27th.

STUEBS, plaintiff, STEPHENSON, deforciant.

A fine may be amended by substituting one county for another, if it appear that the lands, intended to pass, are situate in the same parish which runs into both counties.

MR Serjt. *Best*, on the first day of this term, moved to amend a fine passed in *Hilary* term, 52 *Geo.* 3, by substituting the county of *Southampton* for that of *Berks*, upon an affidavit which stated that certain parcels of land in the parish of *Stratfield-Mortimer*, were, in fact, situate within that parish, but that such lands were not within the county of *Berks*, but in the conterminous county of *Southampton*, and that *Stratfield-Mortimer* ran into both these counties. He conceived, that no possible objection could be made to the amendment, as it was sworn that the parties were all living, and that it was their intension that the lands, in question, should pass. —The court, as the parish in which the lands were situate was not altered, and as they could not pass, according to their present description, in order to give effect to the fine, were inclined to allow the amendment; but on the officer's stating, that it was contrary to the decisions of the former cases of *Kinderley v. Donville*, (a), *Wainwright v. Smith* (b), *Anonymous* (c), *Gill v. Yeates* (d), and *Rashleigh v. Smith* (e), they took time to consider until this day, when they

Allowed the Amendment.

---

(a) 1 *Taunt.* 257. — (b) *Id.* 538. — (c) 3 *Taunt.* 418. — (d) 4 *Taunt.* 708. — (e) *Id.* 855.

BLANCK v. SOLLY and another.

Thursday,  
Nov. 27th.

THIS was an action of *assumpsit* brought for the recovery of £848 : 8s : 11d., for the freight of staves, timber, and deals, carried by the plaintiff on board his ship, from *Dantzic* to *London*.—The cause came on for trial before Lord Chief Justice *Gibbs*, at the sittings at *Guildhall*, after the last term, when it appeared in evidence, that in the month of *August*, 1815, the agents of the defendants at *Dantzic*, shipped a cargo of timber on board the plaintiff's vessel, and consigned the same to the defendants; in consequence of which the plaintiff signed a bill of lading, in which it was stated, that the ship was bound for *Sheerness* for orders, and that the timber was to be delivered as there ordered to the defendants, or their assigns, he or they paying freight for the goods, at certain prices therein stipulated. That the ship sailed, and arrived at *Sheerness*, with the cargo on board, and was ordered by the defendants to be delivered at the *Commercial Docks, Deptford*. That the defendants entered the vessel at the *Custom-house*, and the cargo was landed by them in their names, at the *Commercial Docks*: 'That the day after the delivery commenced, the ship and cargo were seized in the *Docks*, by the revenue-officers, on suspicion, that the ship was not *Prussian* built; and therefore not capable under the navigation act (a), of importing the produce of that country into *England*. That the brokers of the captain and owners,

A vessel freighted by the defendants from *Dantzic* to *London*, was, on her arrival, and after part of the cargo had been delivered at the latter place, seized by the revenue officers, on suspicion that she was not *Prussian* built. The treasury, on petition, ordered the ship to be restored, on condition that the cargo should be exported, and on payment of £50, as a satisfaction to the seizing officers.—*Held*, that this was sufficient to shew that the voyage was illegal without condemnation, and that although the freighters afterwards accepted and exported the cargo, according to the terms of the order, the master of the ship having paid the sum demanded as a satisfaction to the seizing officers, admitted the illegality of the voyage, so as to preclude him from recovering freight.

(a) 12 Car. 2, c. 18, s. 8. By which it is enacted, 'That no sort of masts, timber, or boards, shall be imported into *England*, *Ireland*, or *Wales*, in any ship or vessel, but in such as do truly, and without fraud, belong to the people thereof: and whereof the master, and three-fourths of the mariners, at least, are *English*; under the penalty and forfeiture of the ship and goods.'

1817.  
 {  
 BLANCK  
 v.  
 SOLLY.

with the concurrence of the defendants, presented a petition to the lords of the treasury, who ordered the ship to be restored, on condition that the cargo should be landed and warehoused for a period, not exceeding six months, for exportation only, on payment of a satisfaction of £50 to the seizing officers; and that the defendants subsequently accepted and exported the cargo. On the production of the order of the treasury, his Lordship directed the jury to find a verdict for the defendants, with liberty for the plaintiff to move to set it aside, and instead thereof to enter a verdict for himself, on the ground that the voyage being illegal, the plaintiff, as captain of the vessel, could not maintain an action for freight.

Mr. Serjt. *Vaughan*, on a former day in this term, having accordingly obtained a rule *nisi*, Mr. Serjt. *Lens* was, on this day, about to shew cause, when the court called on the former to support his rule. He observed, that the defendants, at the trial, relied on the case of *Muller v. Gernon* (a), which was distinguishable from the present, as there the plaintiff sought to recover freight for a voyage which was admitted to be illegal, and the only question was, whether an order of council, permitting the landing and exportation of the cargo, would legalize such voyage; but the order of council there did not bear a retrospective view, and Lord *Mansfield* said, that the voyage was clearly illegal, but in this case, there was no evidence of an illegality, for the order of the treasury was no conclusive evidence of the illegality of the voyage. Even if such voyage were illegal, the plaintiff being no party to it, he might recover his freight. The cargo was accepted by the defendants, who afterwards exported it. No suit was instituted on the part of government, and no condemnation took place, nor were

---

(a) 3 *Tampt.* 394.



any proceedings ever instituted for that purpose. By the terms of the bill of lading, the ship was only to go to *Sheerness* for orders. The master, therefore, did not contract to make a delivery in the port of *London*, but that when the vessel arrived at *Sheerness*, she might be sent to any other port, for the purpose of discharging her cargo. There ought not only to have been a seizure of the vessel, but a condemnation also, and the order of the treasury does not amount to a sentence of such condemnation. Still, the defendants, having accepted the cargo since its seizure, and exported it, they are bound to pay the plaintiff the amount of his freight. At all events, the defendants should have tendered to the plaintiff the freight due for that part of the cargo, which had been delivered before seizure. He, therefore, insisted that it ought to have been clearly proved that the voyage was illegal, that the order of the treasury was not sufficient evidence of condemnation for that purpose, and that by the terms of the bill of lading, it was not intended that the cargo should have been landed in *London*, for although part of it had been delivered to the defendants, still it did not appear that it was to be appropriated for home consumption, but that it might have been exported by them in another vessel. Even if the voyage were illegal, the acceptance of the cargo and its subsequent exportation, by the defendants, was sufficient to entitle the plaintiff to recover his freight. After having taken the cargo, they were, at all events, bound to pay, and as no illegality appeared on the bill of lading, the plaintiff, as master of the vessel, was entitled to recover.

Mr. Justice DALLAS.—This case embraces a plain and simple question:—It is an action brought by the master of a foreign ship, who demands freight from the defendants for goods imported into this country;—the

1817.  
 BLANCK  
 v.  
 SOLLY.

1817.  
 ~~~~~  
 BLANCK  
 v.  
 SOLLY.

voyage was clearly an illegal one. On the arrival of the vessel at *Deptford* she was seized, and it has been contended, by my brother *Vaughan*, that as no condemnation has taken place, the plaintiff is entitled to recover. If there had been a condemnation, it is quite clear that the captain could not have recovered his freight. Still, if there has been that which is equivalent thereto, the argument, for the plaintiff, cannot avail him. What are the facts? On the seizure of the vessel, a petition was presented to the treasury for her restoration. The plaintiff, himself, interfered to prevent a condemnation, and consented to export the cargo within a limited time, on payment of a satisfaction of £50 to the seizing officers.—The only question to be considered is, whether this is not *prima facie* uncontradicted evidence of an admission by him of the illegality of the voyage. His conduct, by receiving back the cargo, on the terms ordered by the treasury, and thereby preventing condemnation, is, I think, sufficient to prove the illegality of the voyage, so as to deprive the plaintiff of his freight.

Mr. Justice PARK.—The order from the treasury was not compulsory on the plaintiff;—he might have disputed it, had he thought proper to do so, instead of which, he acquiesced in the terms imposed on him by that order. This, therefore, affords an unqualified presumption, that the voyage was illegal: and as this case cannot be distinguished in principle from that of *Muller v. Gernon*, I think that this verdict ought not to be disturbed.

Mr. Justice BURROUGH.—I am clearly of opinion, not only that this voyage was illegal, but that the plaintiff, by his acts, has admitted its illegality. He expected at least a detention, if not a condemnation of the vessel, and was therefore ready to comply with the terms imposed on him by the order of the treasury. The cargo was under the command of the defendants, who have been

deprived of the advantage of the importation. Under all these circumstances, therefore, I consider that the plaintiff cannot recover his freight.

Rule discharged.

1817.  
BLANCK  
v.  
SOLLY.

FREE, and another, v. HAWKINS.

Thursday,  
Nov. 27.

THIS was an action of *assumpsit*, on a promissory note for £1000, dated the 3d of April, 1813, made by Sir Robert Salusbury, payable twelve months after date, to the defendant, or order, and indorsed by the latter to the plaintiffs.—On the trial of the cause, before Lord Chief Justice Gibbs, at the sittings at Guildhall after the last term, it appeared, that the only defence to the action was a want of notice of dishonour. When this objection was raised by the defendant, his Lordship refused to receive, in evidence, as a waiver of such notice, his having admitted that he knew, and expected that he was not to be called upon for payment of the note, until after the estates of Sir Robert Salusbury were sold, and that whatever might be the course of law, that such was the understanding when the note was given; that he, together with a co-surety, only gave the note as a further, or collateral security, and for the express purpose of allowing time to sell such estates:—and he consequently directed a nonsuit.

Mr. Serjt. Best, on a former day in this term, had obtained a rule *nisi*, that this nonsuit should be set aside, and a new trial granted, on the grounds that no notice of the dishonour was necessary, as this was a common promissory note, for which the plaintiffs had received no value, but had merely taken it as a security for another.

In an action on a promissory note, indorsed by the defendant to the plaintiffs, payable at twelve months after date, a parol agreement entered into between him and the maker when it was drawn, that it was not to be demanded until estates of the maker had been sold, and that the defendant indorsed such note as a surety only, cannot be received in evidence as a waiver of the notice of its dishonour.

1817.  
 FREE  
 v.  
 HAWKINS.

Mr. Serjt. *Lens* and Mr. Serjt. *Pell* now shewed cause, and observed, that this case resolved itself into two questions; *first*, whether the evidence were properly rejected; and, *secondly*, if it had been received, whether, coupled with the circumstances of the case, it would not control its import, so as to render a notice of dishonour unnecessary. It has been said, that it was not payable according to the terms which appeared upon the face of it, but was given merely as a collateral security, in case the estates of Sir *Robert Salusbury* should prove unproductive: That the original transaction, therefore, might be considered as part of that note, and made it a conditional, and not an absolute promise of payment. But the legal effect of the note is, that before the plaintiffs can call on the defendant for payment, they must give him notice of the dishonour by Sir *Robert Salusbury*. The case of *Hoare v. Graham* (a) bears a strong resemblance to the present, where it was held, that in an action on a promissory note, the defendant could not give in evidence a parol agreement, entered into when it was drawn, that it should be renewed and payment not be demanded when it became due, and the decision of Lord *Ellenborough* in that case has not been contraverted by any subsequent determination. In the case of *De Berdt v. Atkinson* (b), it was held, that if the payee of a note lend his name merely to give it credit, and to enable the maker to raise money upon it, and knew at the time that the maker was insolvent, he is not entitled to notice of dishonour, and the notice, in that case was dispensed with, by reason of a knowledge of the insolvency. In *Leach v. Hewitt* (c), it was held that a person who without consideration, but without fraud, indorsed a bill in which both the holder and indorser were fictitious persons, was

---

(a) 3 Camp. 57.—(b) 2 H. Bl. 336.—(c) 4 Taunt. 731.

entitled to a notice of dishonour, and Mr. Justice *Chambre* there refers to a note of Mr. *Barnes* (a), upon the case of *De Berdt v. Atkinson*. Here, the maker of the note was the ostensible person, and the payee a mere surety, having a clear right of action against the maker upon paying the note. The plaintiffs should have applied, in the first instance, to the maker, as the indorsement of the defendant was merely an undertaking to pay the note in case of default by the maker. Although in *Bickerdike v. Bollman* (b), it was held, that if the drawer had no effects in the hands of the drawee from the time the bill was drawn, it was not necessary to give him notice of its dishonour; still, in *Claridge v. Dalton* (c), Mr. Justice *Le Blanc* says, 'Every new case makes one regret that the rule in *Bickerdike v. Bollman*, for dispensing with notice, was ever introduced.' Even if the case of *De Berdt v. Atkinson* establishes the rule which the plaintiffs contend for; still, in *Nicholson v. Gouthit* (d) it was held to be no excuse for not having presented a note in time for payment, that the defendant indorsed it to guaranty a debt from the maker, or that the defendant knew before it was due, that the maker could not pay it, and had desired a banker, at whose house it was made payable, to send it to him and he would pay it. This, being a note indorsed by the defendant to the plaintiffs for the security of the debt of the maker, the defendant is a mere guarantee; and, therefore, entitled to notice of dishonour. As this case therefore differs from that of *De Berdt v. Atkinson*, as here, at the time the note was made, the parties were all in solvent circumstances, and as it must be governed by that of *Hoare v. Graham*, where Lord *Ellenborough* would not allow a qualification to be

1817.  
  
 FREE  
 v.  
 HAWKINS.

---

(a) *Bayley, on Bills*, 3d edit. 136.—(b) 1 *T. R.* 405.—  
 (c) 4 *M. & S.* 231.—(d) 2 *H. Bl.* 609.

1817.  
 ~~~  
 FREE  
 v.  
 HAWKINS.

superadded, and as the facts stated in this case control the express terms of the note, they could not be admitted in evidence. Upon the face of the note, no conclusion could be drawn of the actual understanding between the parties, for the promise for payment is not conditional, but absolute and unqualified. The evidence, therefore, which was offered to contradict the express terms of the note, was inadmissible, and there is no ground for disturbing the verdict of the jury, which was found by the direction of the Lord Chief Justice.

Mr. Serjt. *Best*, in support of the rule, admitted, that the decision of Lord *Ellenborough*, in the case of *Hoare v. Graham*, was perfectly correct, but that that case was distinguishable from the present, as there the condition for a renewal entirely contradicted the instrument which the defendant signed; but here, evidence was refused, which was merely offered to shew the nature of the note and the circumstances under which it was given. At all events, sufficient appeared at the trial to dispense with the notice of dishonour. The evidence offered did not affect the claim of the parties, nor was the admission of the defendant at variance with the terms of the note, as if the estates of Sir *Robert Salisbury* had been sold, the defendant would have been liable to pay before the note became due. It neither contradicted, narrowed, or extended the terms of the note, but merely shewed the intention of the parties. The case of *Bickerdike v. Bellman* has not been overruled, nor has the decision of it been ever doubted. A notice of dishonour is required by a positive rule of law, and by the custom of merchants, to bills and notes given in the ordinary course of commerce, but this rule cannot extend to accommodation bills.—Unless the case of *De Berdt v. Atkinson* be overturned, the defendant cannot be entitled to notice of dishonour. This note was not taken in the course of trade, and the

nature of the evidence offered, was to shew that Sir *Robert Salusbury* was indebted to the plaintiffs, and being desirous to continue his credit with them, proposed to give a promissory note, drawn by himself, payable to the defendant, who indorsed it to the plaintiffs, as a surety for the maker. Sir *Robert* had no money of the defendants in his hands, nor was there any debt existing between them; and the defendant endorsed it expressly for the purpose of becoming a security for him. This case, therefore, comes precisely within that of *De Berdt v. Atkinson*, as the parties stood in a similar situation in both cases, and in neither of them had the defendant received any value. The case of *Nicholson v. Gouthit* was decided under peculiar circumstances, and depended on the mode agreed on between the parties, for the defendant to guaranty payment of a debt by instalments, and the previous case of *De Berdt v. Atkinson* was not there mentioned. The bill of exchange, in the case of *Leach v. Hewitt*, appears to have been made in the ordinary course of trade, and as it was given under no particular circumstances, the defendant was entitled to notice of its dishonour; and Lord Chief Justice *Mansfield* there said, that 'the defendant had only placed himself in the common situation of an indorser.' Although Mr. Justice *Chambre* adopted Mr. *Barnes's* note as his own, still it must be considered as a mere *obiter dictum*. But as the particular circumstances of this case take it out of all those where notes have been given in the usual way, the evidence should have been admitted, as it was not only important to the subject matter under consideration, but also to explain the real circumstances under which the note was given. He cited the case of *Rogers v. Stephens (a)*.

1817.  
 ~~~~~  
 FREE  
 V.  
 HAWKINS.

---

(a) 2 T. R. 713.

1817.  
—  
FREE  
v.  
HAWKINS.

Mr. Justice DALLAS.—It appears to me that my Lord Chief Justice very properly rejected the evidence in this case, considering for what purpose and to what object it was intended to be applied. These are the facts:—The plaintiffs were correspondents of Sir *Robert Salusbury & Co.*, who were bankers in the country, and who were considerably indebted to the plaintiffs, bankers, in *London*. The plaintiffs requiring securities from Sir *Robert Salusbury*, ten of his friends, at his instance, engaged to indorse promissory notes of £1000, each, at twelve months date, for securing the debt due from him to the plaintiffs. One of these notes, on which the present action was brought, was drawn by Sir *Robert Salusbury*, payable to the defendant, or order, and by the latter indorsed to the plaintiffs. This note was drawn in the common form, and purports to be payable at the expiration of one year from the day of its date. It has been said, that at the time it was made, it was understood between the parties that it was given as a security only, and was not to be put in force, until the estates of Sir *Robert Salusbury* had been sold. Evidence was offered, at the trial, that no notice of the dishonour was given to the defendant, as the indorser of the note, who had a full knowledge of the circumstances, under which it was given, and that his liability was not to attach, but in the event of a collateral fact. It may be observed, in the first place, that if the real nature of the engagement was to control the operation of the note, such engagement should have been expressed upon the face of it; but the fact is otherwise, and as it is drawn in the usual manner, the defendant, at the expiration of the time limited for payment, was entitled to notice of its having been dishonoured by Sir *Robert Salusbury*, on whose default only his liability attached. It has been insisted, that this notice might be dispensed with,



from the understanding which existed between the parties. The effect of the evidence offered was contrary to the terms which appeared upon the face of the note, and tended to control its legal operation; and as the consideration for which the note was given did not appear, I think that such evidence should not have been admitted. The case of *Hoare v. Graham*, by which the present must be governed, was rightly decided; and Lord *Ellenborough* there determined, not on the ground that the note was given as a collateral security, but that that there was a parol condition for a renewal, entirely contradictory to the instrument, which was made payable on a certain day, and as such evidence tended to contradict the note, it was very properly rejected. The case of *De Berdt v. Atkinson* differs, and is distinguishable from the present, for the defendant here indorsed the note, for which he had received no value, as a surety;—but in *De Berdt v. Atkinson* the defendant lent his name, merely to give credit to the note, and it was known to all the parties, at the time it was drawn and indorsed, that the drawer was insolvent. If these circumstances had been proved, still they would not have dispensed with the necessity of the notice; for although payment of the note might not be enforced until the estate of Sir *Robert Salusbury* had been sold, still, at the expiration of the year, he should have had notice, that it was not disposed of. But as collateral evidence cannot be admitted to vary the terms of the note, I think that the defendant should have had due notice of its dishonour.

Mr. Justice PARK. Although I have paid great attention to the argument of my brother *Best*, I cannot distinguish this case from that of *Hoare v. Graham*.—I was counsel in that cause, and took nearly the same objections as have been now raised;—but I think the decision of Lord *Ellenborough* was perfectly correct, and he there says, ‘What is to be-

1817.

FREE

v.

HAWKINS,

1817.  
 FREE  
 v.  
 HAWKINS.

‘ come of bills of exchange and promissory notes, if they  
 ‘ may be cut down by a secret agreement, that they shall  
 ‘ not be put in suit? The parol condition is quite inconsis-  
 ‘ tent with the written instrument.’ Here, the note pur-  
 ports to be payable twelve months after date, but it has  
 been stated, that there was a private agreement between  
 the parties that it should not be so; but the note is wholly  
 inconsistent with that agreement.—My brother *Best* has  
 said, that the want of notice did not destroy the note;  
 the legal effect and operation of which was to pay within  
 a twelvemonth from its date. If the maker had dis-  
 honoured it at that time, the defendant, as indorser, was  
 entitled to notice; and I think that the evidence offered  
 as a waiver of such notice was inadmissible, and most  
 properly rejected.

Mr. Justice BURROUGH.—I am clearly of opinion that  
 this evidence ought not to have been received at the  
 trial,—promissory notes are now placed on the same  
 footing as bills of exchange, and the express terms for  
 which they were given ought to appear upon the face of  
 them. The object of the note here, was to give a security  
 to the plaintiffs, and it therefore bears no relation to an  
 accommodation note. From the nature of the indorse-  
 ment, the plaintiffs had a right to proceed against the  
 defendant, as in ordinary cases;—still, it has been said,  
 that evidence might be introduced, to shew that it was  
 not payable twelve months after date; but when the  
 estates of Sir *Robert Salusbury* were sold, which might be  
 either previous or subsequent to the time when the note  
 would become due.—This evidence therefore would give  
 a different effect to the note, and it is one of the first  
 principles of law, that no parol proof can be received,  
 which effectually tends to alter the terms of a written in-  
 strument. The cases of accommodation notes are not  
 applicable to this case,—as a notice of dishonour is there

dispensed with, because the note is originally vicious. In this case there was no fraud, and the note was made payable on a particular day, as in a common and ordinary transaction. I therefore consider that this evidence could not be received, and that it would be extremely dangerous if a negociable instrument of this nature could be cut down or altered by matter *dehors*, or a private agreement between the parties.

1817.  
  
 FREE  
 v.  
 HAWKINS.

Rule discharged.

TRUETTEL and another, *v.* BARANDON and another.

Thursday,  
 Nov. 27th.

THIS was an action of trover, brought against the defendants, for the recovery of two bills of exchange, the one dated the 25th of *November*, 1815, drawn by *Garton* upon, and accepted by *Speare*, for £171 : 13s. : 2d., payable to *Garton's* order eight months after date, and indorsed, 'Pay to *J. P. Duroure*, Esq. or order, for account of Messrs. *Truettel* and *Wurtz*.' The other, bearing the same date, was drawn by *Creswick* upon, and accepted by *Speare*, for £171 : 13s. : 3d. payable to *Creswick's* order, nine months after date, with an indorsement similar to the preceding one. On the trial of the cause before Lord Chief Justice *Gibbs*, at *Guildhall*, at the sittings after the last term, it appeared that the bills had been deposited with the defendants, by *Duroure* and Co., the agents of the plaintiffs, without their authority, as a security for cash advances. *Duroure* stated, that he received the bills from the plaintiffs, to whom he was an agent, and gave them to the defendants, as a security on his own account,

Bills of exchange indorsed to an agent of the plaintiffs or order for their account, deposited with the defendants by such agent as a security for future advances, may be recovered by the plaintiffs in an action of trover.

1817.  
  
 TRUETTEL  
 v.  
 BARANDOW.

and that they were not deposited on discount. That he was considerably indebted to the defendants when the bills were deposited, who were in the habit of advancing money to him, and that such advances were continued, after such transaction. On the part of the defendants it was submitted that the action could not be maintained on two grounds; *first*, that an agent or factor might pledge or negotiate bills indorsed to him to receive for a correspondent, provided such indorsement did not restrict their negociability:—*secondly*, that there was nothing in the indorsement which could be considered a restriction, because the words ‘pay to *J. P. Duroure*, Esq., or order, for account of Messrs. *Truettel and Wurtz*,’ were only meant to distinguish in the accounts of the acceptor, who had become insolvent, the creditor to whom the different bills were given in payment. His Lordship, however, thought, that the indorsement restricted the negociability of the bills, and that *Duroure* had no right to deposit them. The jury found a verdict for the plaintiffs for £365: 12s.: 11d., which included interest to the time of judgment. To this verdict the counsel of the defendant objected, contending that the plaintiffs were not entitled to interest, but his Lordship overruled the objection, and stated, that he considered they were entitled to it by way of damages.

Mr. Serjt. *Copley*, on a former day in this term, had obtained a rule *nisi*, that this verdict might be set aside, and a nonsuit entered.

Mr. Serjt. *Lens* was now about to shew cause, when the court called upon Mr. Serjeant *Copley* to support his rule. He submitted, that as *Duroure* might have negotiated or discounted the bills, he had a right to deposit them with the defendants. The only question seemed to be, whether *Duroure* was legally empowered to negotiate them; and as he might have discounted them, no

restraint could be put on him. He was not restricted by the indorsements from sending them into the market for any purposes which he might have thought proper. In *Evans v. Cramlington* (a), where a bill was payable to *A.* or order, for the use of *B.*, it was held, that the right to transfer was in *A.*, who was empowered to indorse it. *Duroure*, therefore, was authorised to indorse the bills in question; and as he might have discounted them, he might also have applied the money arising upon them to his own purpose. As he had a running account with the plaintiffs, he might have handed over the bills to a third person to cover daily advances, and it was quite immaterial whether they were deposited as a security, or for the purpose of being discounted; for instead thereof, he might have drawn generally, leaving the account to be settled at a future time. There is a distinction between a factor's pledging property for a debt actually due, and where there is a running account between him and the person with whom such property is pledged. Here, the bills were not pledged for a past debt, but for the purpose of procuring advances on them. In *Collins v. Martin* (b) it was held, that if a bill indorsed in blank, be deposited with a banker, to be received when due, and the latter raise money upon it by pledging it with another banker, and afterwards become bankrupt, that the person depositing could not maintain trover against the latter banker for the bills; and the distinction is there drawn between bills of exchange and other property; for the former are negotiable instruments. The indorsement to *Duroure or order*, makes the bills in this case negotiable, and it therefore falls within the principles laid down in *Collins v. Martin*, and the plaintiffs are not entitled to recover.

1817.

TRUETTEL  
v.  
BARANDOW.

---

(a) *Carth.* 5. *S. C.* 2 *Vent.* 307. *Skin.* 264. — (b) 1 *B.* and *P.* 648.

1817.  
  
 TRUETTEL  
 v.  
 BARANDON.

Mr. Justice DALLAS.—It is unnecessary, in this case, to touch on the judgment of the court in that of *Collins v. Martin*. There can be no doubt, that if a person deposit a bill of exchange, which is indorsed in blank (and therefore a negotiable instrument) with a banker for the purpose of being received when due, if pledged by the banker for his own debt, that it cannot be followed by the owner into the hands of the pledgee, for the indorsement passes the property in the bill. But the bills in this case were of a different description; for they did not come into the hands of *Duroure* with a general indorsement to authorize his transfer of them. They were indorsed to him '*for account of the plaintiffs*.' An ordinary indorsement would not have restrained their negotiability; for it would then appear that they were indorsed for a *bona fide* transaction. The defendants ought to have collected from the indorsements that the bills were the plaintiffs' property, and not *Duroure's*; and that the latter had no right to deposit them with the defendants, either for past or future advances. They were left with them by way of security; and under the circumstances I think they had sufficient notice that the bills were not the property of *Duroure* who pledged them.

Mr. Justice PARK.—If this decision affected the case of *Collins v. Martin*, I should require consideration before I stated my opinion. The case is reduced to a single point, and the question is not whether these bills were negotiable, but whether the defendants did not know that they were the property of the plaintiffs, when they were deposited with them by *Duroure*, and as I think there can be no doubt but that they had notice of this fact, the plaintiffs are entitled to recover.

Mr. Justice BURROUGH.—There is a great difference between bills of exchange left for the purpose of being discounted, and those which are deposited as a security

for future advances; as the person who discounts them makes a deduction for so doing, by which the account is altered. In this case *Durore* never received any money, although there was a prior debt between him and the defendants. His not having received money on the deposit of the bills, they could not form an item of the account, so as to devalue the plaintiffs of the benefit which they were entitled to derive from them.

1817.

TRUETTEL  
v.  
BARANDON.

Rule discharged:

CRISPIN, and another, v. WILLIAMSON.

Friday,  
Nov. 28th.

THIS was an action of *assumpsit*, in which the plaintiffs sought to recover the sum of £300 : 16s. : 3d., being the difference between the invoice price of a cargo of oranges and lemons, (shipped by them on account of the defendant which were rejected by the latter and sold by public auction;) and the net proceeds of the sale.—The first count of the declaration stated, that in consideration that the plaintiffs would bargain and sell to the defendant three hundred and twenty-eight chests, and thirty half chests of oranges and lemons; one hundred dozen of baskets and twenty serons of almonds, at certain prices agreed on between them, amounting to £623 : 3s., the defendant undertook to accept a bill of exchange to be drawn by the plaintiffs upon him, payable at thirty days sight, for the value or price of the goods so bargained and sold, whenever after the bargain and sale, the defendant should be requested by the plaintiffs so to do.—The plaintiffs then averred that they bargained and sold

The plaintiffs declared that they agreed to sell, and the defendant to buy certain goods and merchandize; *to wit*, three hundred and twenty-eight chests and thirty half chests of oranges and lemons, at and for a certain price, *to wit*, the price of £623 3s.—The contract proved, was for three hundred and eight chests, and thirty half chests of *China* oranges, and twenty chests of lemons, without specifying price.—*Held*, that this was no variance.

1817.  
 CRISPIN  
 v.  
 WILLIAMSON.

the goods to the defendant, and after such bargain and sale drew a bill of exchange on him for the value of the goods, which was duly presented to him for his acceptance, and assigned for breach that the defendant would not accept, or in any way pay or discharge the bill; by means whereof, the plaintiffs were obliged to take up and pay the same, and thereby lost and had been deprived of the gain and benefit that would have accrued to them from the use of the bill, had the same been accepted by the defendant. The *second* count stated, that the defendant bargained for and bought of the plaintiffs, and the plaintiffs, at his request, sold to him certain other goods and merchandises, *to wit*, three hundred and twenty-eight chests, and thirty half chests of oranges and lemons; twenty bundles of baskets, and twenty serons of sweet almonds, at and for a certain large price or sum, *to wit*, the price or sum of £623. : 3s., to be delivered by the plaintiffs to the defendant within a reasonable time from thence next ensuing, and to be paid for by the defendants to the plaintiffs within a reasonable time from the time of such bargain and sale; and in consideration that the plaintiffs at the request of the defendant had undertaken to deliver the goods to him, he undertook to accept and pay for the same within a reasonable time. And that although the plaintiffs, within such time, were ready and willing, and tendered and offered to deliver the goods to the defendant, and requested him to accept and pay for the same; yet that he would not accept or pay the plaintiffs for the goods, although the time in that behalf specified had long since elapsed. The declaration contained other counts for goods sold and delivered, work and labour, and the common money counts.—At the trial of the case before Mr. Justice Dallas, at *Guildhall*, at the sittings after the last term, to prove the order for the goods, the plaintiffs put in evidence two letters from the defendant,



the first of which was dated on the 19th of *July*, 1816, and addressed to them in the following terms :

1817.

CRISPIN

v.

WILLIAMSON.

‘ Gentlemen,

‘ In the expectation that you will ship me a cargo of fruit, that shall be equal in every respect to those shipped by your neighbour, I am induced to order a small cargo. I have therefore now to request you will charter a small fast-sailing vessel, and load her on my account with *about three hundred* chests of *China* oranges; fifty chests of lemons, twenty serons of almonds, fourteen bundles of large, and six bundles of small baskets.’

By the other letter, dated the 24th of *August*, 1816, the defendant advised the plaintiffs that he had himself chartered a schooner, and directed them to put on board her three hundred and eight chests, and thirty half chests of *China* oranges, twenty chests of lemons, and the baskets and almonds as ordered in the former letter.

The plaintiffs then proved the arrival of the schooner, with the goods on board as ordered in the last letter, and the presentment of the bill to the defendant, who refused to accept it.

For the defendant, it was submitted, by Mr. Serjt. *Best*, that the plaintiffs could not recover in the shape of damages for a breach of the contract, as stated in the two first counts of the declaration, neither of which could be sustained by the evidence.—That the first was clearly bad, as no evidence had been adduced of a contract by the defendant to accept a bill of exchange; and that independently of this, there was a complete variance between the contract as laid in both these counts, and that proved, both as to the quantity and description of the goods. That the order contained in the letter of

1817.  
CRISPIN  
v.  
WILLIAMSON.

the 24th of *August*, (being that which was acted upon) was for three hundred and eight chests, and thirty half chests of *China* oranges, twenty chests of lemons, and the baskets and almonds, as ordered in the former letter of the 19th of *July*, being twenty serons of almonds, and fourteen bundles of large, and six bundles of small baskets; whereas the first count of the declaration stated the contract to be for three hundred and twenty-eight chests, and thirty half chests of oranges and lemons, one hundred dozen of baskets, and twenty serons of almonds; and in the second count to be for three hundred and twenty-eight chests, and thirty half chests of oranges and lemons, twenty bundles of baskets, and twenty serons of sweet almonds. That by the contract as set out in both these counts, the oranges and lemons might be mixed together, and it did not appear how many boxes of each sort were to be sent, or whether every box might not contain some of both these fruits, and that the contract was not for goods at a specific price, as stated in the declaration, but upon a *quantum valebant*; and that, at all events, as both counts had omitted to state that the goods sent were equal to those shipped by the plaintiff's neighbour, it was a substantial variance, and that consequently they were not entitled to recover.—The learned judge, however, stated, that it was clear the oranges were to be paid for in some way, and in point of probability by a bill of exchange; that the conduct of the parties furnished a degree of evidence to go to the jury; that although the averment in the declaration was for three hundred and twenty-eight chests, *still* that the precise quantity was immaterial on account of its being laid under a *videhac* in the second count; that by the terms of the order contained in the letter of the 19th of *July*, 1816, it appeared to be for *about* a certain quantity, and he re-

ferred to the case of *Gladstone v. Neale* (a), as being precisely in point. The jury having found a verdict for the plaintiffs, leave was given to the defendant to move to set it aside, and that a nonsuit might be entered on the above objections.

1917.  
 CRISPIN  
 v.  
 WILLIAMSON

Mr. Serjt. *Best* having, accordingly, on a former day obtained a rule *nisi*, Mr. Serjt. *Lens* shewed cause and submitted that there was no validity in either of the objections, and that the contract was substantially set forth in the declaration. The essence of the contract was for the plaintiffs to sell, and the defendant to purchase certain goods, which in the second count were laid under a *videlicet*, and the exact quantity therefore need not be precisely stated.—The order was, in fact, absolutely complied with;—an express averment of quantity or quality was unnecessary. By the terms of the letter, in which the first order was contained, no specific number was mentioned. This case, therefore, comes within the decision of the court of *King's Bench*, in that of *Gladstone v. Neale*, which was a contract for the purchase of a certain parcel of hemp, the exact amount of which not being known at the time, was described in the contract as *about* eight tons, and the court held, that there was no material variance, as it might be declared on as a contract for eight tons, which quantity was laid under a *videlicet*. Here, the original order was not for a definite quantity, but the substance of the bargain was indefinite. Although three hundred and eight baskets only of oranges and lemons had been sent, still the variation in number was not of itself sufficient to vitiate the bargain:—the plaintiffs were even entitled to recover on the count for goods sold and delivered, for the fruit was not only ready to be delivered, but actually tendered to the defendant, who re-

---

(a) 13 E. R. 410.

1817.  
  
 CRISPIN  
 v.  
 WILLIAMSON.

fused to accept it.—Unless such refusal could be justified, the plaintiffs were entitled to a verdict.—The fruit was re-sold for the benefit of all parties, as it would otherwise have perished and become wholly useless. Another objection had been raised as to price, and that the plaintiffs could only recover on a *quantum valebant*; but as the specific number need not be stated, it would be a sufficient compliance with the order to aver under a *videlicet*, about the sum the order furnished would amount to.—So, in the second count, as the fruit was laid under a *videlicet*, and stated to consist of three hundred and twenty-eight chests, and thirty half chests of oranges and lemons, it was sufficient, not only to satisfy the terms of the order, but to shew that they were not mixed together in the chests. With respect to the statement in the first count, that the defendant undertook to accept a bill of exchange for the amount of the goods, the jury might infer that such an undertaking was part of the contract. As to the omission in the declaration, that the goods sent to the defendant were not equal to those shipped by the plaintiff's neighbour, it was perfectly immaterial, as no reference was made in the second letter, on the faith of which the order was sent, as to the quality of the oranges and lemons; and there was consequently no ground to disturb the verdict, and much less so, to apply for a nonsuit.

Mr. Serjt. *Best*, (and Mr. Serjt. *Vaughan* was with him) in support of the rule insisted, that they were entitled to a nonsuit, as the contract laid in the declaration was altogether different from that which had been proved by the letters. That the contract could only be derived from these letters, as no other evidence was adduced at the trial, and as the bargain was entire, the variance was fatal. Where there is a contract in writing, no evidence can be given to vary or contradict it. Neither of the letters

stated that the defendant had undertaken to accept a bill for the amount, and, therefore, the first count was clearly void, and insupportable. Both the letters must be taken together. In the first, the defendant requested the plaintiffs to charter a vessel on his account, and load her with *about* three hundred chests of *China* oranges, and fifty chests of lemons, and as he could not prove the exact size of the vessel, or the precise quantity she could carry, he was precluded from stating a specific number; and, therefore, used the word *about*. But in the second letter, having chartered a vessel himself, he ordered a precise and definite quantity of each fruit; namely, three hundred and *eight* chests, and thirty half chests of *China* oranges and twenty chests of lemons; but in the second count of the declaration they were described as three hundred and *twenty-eight* chests, and thirty half chests of oranges and lemons. By that, it appears, that the contract would have been complied with, if the plaintiffs had sent equal quantities of each fruit. As the order in the second letter was for a definite quantity, this case is clearly distinguishable from that of *Gladstone v. Neale*, as there, the precise quantity was not known at the time the contract was entered into, but before the action was brought the exact amount was ascertained; and the court there decided on the construction of the word *about*, which was proved to be in the contract, whereas, in the declaration, the exact amount was laid under a *videlicet*. The number of chests in the last letter being definite, was the essence of the contract, and should therefore have been precisely set forth in the declaration, for where the consideration or contract alleged is material, the stating it under a *videlicet* will not avoid the consequences of a variance. By the terms of the declaration, the oranges and lemons might be mixed in one chest, although distinct portions of each were ordered;

1817.  
CRISPIN  
v.  
WILLIAMSON,

1817.  
 CRISPIN  
 v.  
 WILLIAMSON.

and, therefore, this defect cannot be cured by a *videlicet*. In *Thornton v. Kempster* (a), where a person agreed to buy a quantity of *Saint Petersburg* clean hemp, through the medium of a broker, who gave him a bought note, in which by mistake he inserted *Riga Rhine* hemp, instead of *Saint Petersburg* clean hemp; and then delivered a sale note to the seller, stated according to the original contract; it was held that the variance between those notes was fatal. So, here, a certain quantity of oranges were ordered, and a definite portion of lemons. [Mr. Justice *Burrough* mentioned the case of *Dunston v. Tatham* (b) where the declaration stated, that in consideration that the plaintiff would buy of the defendant forty-five sheep, for £54. : 11s. : 6d., the defendant undertook that they were sound, and the plaintiff proved the price to be £54 : 12s. : 6d. Mr. Justice *Buller*, before whom the cause was tried, held the variance to be fatal, because the sum was not laid under a *videlicet*, and nonsuited the plaintiff.]—As the plaintiffs can only recover on the second count, and as the contract is there improperly set forth, both as to the quantity and description of the goods, the one of which is equally essential as the other, a *videlicet* cannot avail, and consequently they are not entitled to recover,

*Curr. adv. vult.*

On this day, Mr. Justice DALLAS delivered the following judgment of the court:

In this case, the first count of the declaration is not sustained by the evidence;—and if it be bad for one reason, it becomes unnecessary to examine others. It states as part of the contract an undertaking to accept a bill of a certain description. The contract proved con-

---

(a) 1 *Marsh*, 355.—(b) *Taunton Spring Assizes*, 1788.

tains no such undertaking. This therefore is a material variance.—The second count in substance states that the plaintiff agreed to sell, and the defendant to buy certain goods and merchandize, *viz.* three hundred and twenty-eight chests of oranges, and thirty half chests of oranges and lemons. It then alleges performance on the part of the plaintiff, a tender to the defendant, and a refusal by him to accept, being therefore in substance a count for goods bargained and sold. The quantity is stated under a *videlicet*, and the variance insisted upon is, first that the order was for one hundred and eight chests of oranges, not one hundred and twenty-eight, and next, that the order was as to chests and half chests of oranges singly, and not of oranges and lemons jointly. It is not necessary to go into all that is elementary on the office of a *videlicet*.—A party may, in certain cases, impose upon himself the necessity of proving precisely what is stated, if not stated under a *videlicet*. In others, if laid under a *videlicet*, such proof will not be necessary; and again, a statement under a *videlicet* will not dispense with the necessity of exact proof, where the thing so stated is of the essence of the contract. In this case, it is said, quantity is to be so considered. In a count for goods bargained and sold, it is not necessary to prove the quantity, if stated under a *videlicet*; but on the trial, the plaintiff must prove performance of the agreement on his part. And so the plaintiffs did in the present instance; the letter of advice, the invoice, the bill of lading, all sent to the defendant, and in evidence on the trial of the cause, exactly corresponded in respective quantities with the different articles ordered, and the bill of lading was indorsed over by the defendant himself to enable the goods to be sold on account of the shippers. No objection as to quantity was made; nor could it be, for the order and the goods tendered, exactly tallied and agreed. The objections raised by the defendant at the trial were

1817.

CRISPIN

WILLIAMSON.

1817.  
 CRISPIN  
 v.  
 WILLIAMSON.

that the chests were improper in which the fruit was packed, and that the fruit was bad. On this, the enquiry turned.—Both points the jury found against him, and that, in all respects, the order was properly executed by the plaintiffs. In substance, therefore, they were entitled to recover, and the objection resolves itself into matter of form only. Still, however, if such objection be good, it must be sustained. But we think, that under the precise facts of this case, the plaintiffs were not tied down by the statement under the *videlicet*, and that the rule must consequently be

Discharged (a).

(a) See *Wildman v. Glossop*. 1 Barn. & Ald. 9.

Friday,  
 Nov. 28th.

LEE, and another, v. ZAGURY.

The defendant drew a bill of exchange at *Marseilles*, on *B.* in *London*, which he accepted, payable to the order of *C.*, who indorsed it to the plaintiffs—

On the bills being dishonoured, the plaintiffs commenced an action against the defendant, it being then held by them as the agents of *C.*—A former bill had been drawn by the defendant on *D.*, which at the time of its dishonour was held by *E.*, who took it up, and having struck out his indorsement, sent it to *F.*, to be forwarded to *G. and Co.*, at *Marseilles*, for the purpose of receiving the amount from the defendant.—*G. and Co.*, in breach of the trust reposed in them, indorsed it, being overdue at the time to *C.* for a valuable consideration.—On *C.*'s demanding payment from the defendant, he drew the bill in question as a substitution for the former, and delivered it to *C.*—Before the latter bill became due, *E.* gave the defendant notice not to pay it.—*Held*, that he was not liable, as the plaintiffs held the bill as the agents of *C.*, and that they could only recover to be accountable to him, and that *C.* had no right to recover, as the produce of it belonged to *E.*, who had given the defendant notice not to pay it.

THIS was an action on a bill of exchange, for £214; 12s. : 2d., dated the 3d of *January*, 1817, drawn by the defendant, at *Marseilles*, upon, and accepted by *Solomon Zagury*, his brother, in *London*, payable ninety days after date, to the order of *Monsieur Vidal*, who indorsed it to the plaintiffs.—The cause was tried before Lord Chief



Justice Gibbs, at *Guildhall*, at the sittings after the last term, when the plaintiffs proved the hand-writing of the drawer, acceptor, and indorser; the presentment of the bill to the drawee for payment, its dishonour by him, and protest for non-payment. The defence given in evidence was, that the defendant being considerably indebted to a person of the name of *Sebag*, the latter requested him to furnish him with the means of obtaining money by the acceptance of a third person. The defendant, accordingly, on the 18th of *July*, 1816, drew a bill upon one *Pinto*, for £208 : 6s. : 1d., payable to his own order, three months after date. This bill was accepted by *Pinto*, and indorsed by the defendant to *Sebag*, with the understanding that it was to be provided for by the latter, who accordingly took it up; but not until after it had been dishonoured and protested. When this bill became due, the defendant was at *Marseilles*, and *Sebag*, after paying it, struck out his indorsement, and put it into the hands of a person of the name of *White*, in *London*, with a request for him to send it to his correspondents, at *Marseilles*, to receive it from the defendant, on his, *Sebag's* account.—*White* accordingly sent the bill to Messrs. *Ogilvie* and *Budd*, of *Marseilles*, who dishonestly indorsed and paid it away, after its maturity, for value to *Vidal*, for a debt due to him from them. *Vidal* demanded payment of the defendant, and having threatened him with an arrest, he drew the bill of exchange on which this action was brought, on his brother in *London*, for £214 : 12s. : 2d., which included the interest and charges on the original bill, and delivered the same to *Vidal*, in payment of the first bill. Before the bill in question became due, *Sebag* gave the defendant notice not to pay it. A bill having been filed in the *Exchequer*, against the plaintiffs, it appeared by their answer, that they received both the bills from *Vidal*, as

1817.

LEE

v.

ZAGURY.

1817.  
 {  
 LEE  
 v.  
 ZAGURY.

his agents, and that they gave no consideration for the bill in question; and that when it fell due, and was dishonoured, he was again debited with the amount.—His Lordship left it to the jury to determine, whether the plaintiffs were the agents of *Vidal*, and whether the bill might not, under the circumstances given in evidence, be considered the property of *Sebag*, although his name did not appear upon it; and if so, whether the notice from him to the defendant not to pay, it was a good answer to the action.—The jury found a verdict for the defendant, but leave was given to the plaintiffs to move to set it aside, and that instead thereof a verdict might be entered for them.

Mr. Serjt. *Vaughan*, on a former day in this term, having accordingly obtained a rule *nisi*, Mr. Serjt. *Copley* shewed cause, and submitted, that the facts proved at the trial were conclusive to warrant the jury in finding a verdict for the defendant. The plaintiffs were, in effect, *Vidal*, as they were merely his agents, and held the bill in question for him as their principal, and they could consequently have no better title to the bill than *Vidal* himself had. *Sebag* had clearly a right to intervene and prevent the defendant from paying it. Although his name did not appear on the face of the bill, still it in effect belonged to him, and his order was therefore sufficient for the defendant to refuse payment. The bill for which this was substituted was overdue before it was indorsed by *Ogilvie and Co.* It was their duty to have held that bill as agents for *Sebag*.—Although *Vidal* gave them a good consideration for it, still, as he received it after it became due, he had merely the same right against *Sebag*, as *Ogilvie and Co.* or *White* had. On *Vidal's* taking the bill in question as a substitution for the former, he could not vary *Sebag's* rights on the first, for the second was subject to the same restrictions, and *Sebag* was therefore

Beneficially interested. *Vidal* was, in effect, *Sebag's* agent, for *Ogilvie and Co.* had no right to indorse the bill to him; and he therefore could not deprive *Sebag* of his interest by accepting it as a debt due from them to him. This, therefore, was *Vidal's* action, and he being liable to account to *Sebag*, who had ordered the defendant not to pay the bill, he was perfectly justified in so doing, and the plaintiffs therefore had no pretence to recover.

Mr. Serjt. *Vaughan*, in support of the rule.—*Vidal*, being indebted to the plaintiffs, they had under the indorsement a good title to the bill, and for the purpose of the present action it must be considered a *bonâ fide* negotiation of it from *Vidal* to them.—When the bill reached the hands of the plaintiffs, there appeared nothing upon the face of it to excite the slightest suspicion that there was any vice belonging to it, and as they procured the acceptance of it, by the drawee, it was a subsequent confirmation of the *bonâ fide* part of the transaction. From the time the bill was drawn until after it became due, no objection was made, either to the plaintiff's or *Vidal's* right to the possession of it, and if the plaintiffs had indorsed and negotiated it before it became due, what was there to prevent their doing so?—If they had so done, would not the party to whom it had been indorsed, be entitled to enforce payment, (supposing him to be an innocent holder) from all the other parties to the bill?—And were not the plaintiffs equally in a condition to enforce payment from the defendant, and all the previous parties to it?—Suppose it became necessary for the plaintiffs to have enforced payment from *Vidal*, of the balance he owed them, could they not have elected to sue him as the last indorser of the bill, which formed an *item* in the account on which they became his creditors? It is true, that the plaintiffs received the bill in a remittance as the agents of *Vidal*;

1817.

LEE  
v.

ZAGURY.

1817.  
 {  
 LEE  
 v.  
 ZAGURY.

but still, as that remittance was to be carried to his account with them, and he being their debtor, they had a lien over that remittance until his debt was satisfied, and could proceed against him upon whatever bill of exchange the remittance might consist of, to which his name appeared as the indorser, or otherwise. That being the case, the plaintiffs must be considered in the light of third persons, who took the bill innocently, and without any knowledge of the fraud that might have been practised upon the defendant or *Sebag*.—In another point of view, this action cannot be defended;—it is not founded on a bill taken after maturity and dishonour, but the bill in question was given in lieu of another, received certainly after maturity by *Vidal*, but for which he had given value, and to which the defendant admitted himself liable, by giving the substituted bill. Had not the defendant done this act, confirming his liability to pay the original bill, *Vidal* might have at least had his recourse against the party from whom he received the original bill, but he was deprived of that advantage, and now learns that in consequence of a notice from *Sebag*, a party unknown to him, and whose name does not appear on either of the bills, that he has no title to the bill in question, and although no notice was given to him, by *Sebag*, that he should claim the benefit of the bill, and had directed the defendant not to pay it; still, that notice is said to be conclusive against the plaintiffs. There can be no principle upon which a communication to a third person, from a party who is a perfect stranger to the plaintiffs, can furnish a defence to an action founded as the present. So, *Vidal* could not be supposed to know that the original bill was improperly indorsed to him by *Ogilvie* and *Budd*, and the circumstance of the defendant having given him a substituted bill naturally removed from his mind any doubt he might have.

fore have entertained in consequence of taking the original bill, after its maturity. It was impossible that *Vidal* could be considered as *Sebag's* agent, for there was no connection between them, and the latter had destroyed his right, by erasing his name from the original bill; and he had, in fact, no equitable interest in either of them. Although *Sebag* might be ultimately entitled to the produce of the bill in question, still, he had his remedy against *White*, to whom he had entrusted the original bill.

1817.  
  
 LEE  
 v.  
 ZAGURY.

The court suggested to Mr. Serjt. *Vaughan*, the propriety of the plaintiffs consenting to a *stet processus*; and the cause stood over for that purpose till this day; when the learned serjeant having said that he had received no intimation of their acquiescence,

Mr. Justice DALLAS delivered the following judgment of the court:

This was an action on a bill of exchange, drawn by the defendant, on *Simon Zagury*, payable to the order of *Vidal*, who indorsed it to the plaintiffs.—It is not necessary to travel through all the particulars of the various transactions between the different parties, for they conduct us at last to this admitted result; that the bill in question was held by the plaintiffs, as agents for *Vidal*, at the time of this action being brought. This is, therefore, in effect, the action of *Vidal*, and they could only recover to be accountable to him. But *Vidal* could have no right to recover on the bill, for the produce of it most clearly belonged to a person of the name of *Sebag*. The facts of the case in this respect were shortly these:—A former bill had been dishonoured, of which *Sebag* became ultimately the holder; he sent it to a person of the name of *White* to be renewed after it was due, who forwarded it to *Murwilles to Ogilvie and Co.* for the purpose of

1817.  
LEE  
v.  
ZAGURY.

renewing it there. *Ogilvie and Co.*, in breach of the trust reposed in them, indorsed it, being over-due at the time, to *Vidal*, for a valuable consideration, who took it, of course, subject to all the equity which affected it in the hands of *Ogilvie and Co.*—On application to the defendant, as the drawer, *Vidal* took another bill as a substitute for the first, and which is the bill in question. But by taking the second bill, he could not vary the rights of *Sebag* on the first, who was still entitled to whatever that bill might produce;—and the second bill was the fruit of the first, and as the first belonged to him, so did the produce of the second, substituted for the first. And, therefore, it is argued that *Sebag* is the person who is beneficially interested in this bill, and to whom the plaintiffs must account, if they were to recover in this action; the question then seems merely to be, whether they should be permitted to recover on a general title, as indorsees, merely to be subjected to an action for money had and received. This ought not to be, if it can be avoided;—and we think it may. For in this action, it is competent to shew that *Vidal*, by the mere act of indorsing, could convey no title to them, who admit they held it merely as agents for him, whatever might be the question as to third persons, and this was proved in the cause.—The plaintiffs are, therefore, in effect, *Vidal*, and *Vidal* held it but for *Sebag*, to whom he was liable to account for it, and *Sebag* has given notice to the defendant not to pay.—We are therefore of opinion, all these facts having been proved at the trial, that there ought to be a verdict for the defendant.

Rule discharged.

GAMMON, and another, v. EVERLEY.

Friday,  
Nov. 28th.

THIS was an action of *assumpsit* brought to recover a salvage loss on the defendant's subscription of £300, to a policy of insurance effected by the plaintiffs, as agents for *John Hodgson*, on the 13th of *August*, 1814, amounting to £64 : 18s. : 3d. *per cent.*, on hides, valued at twenty shillings each, by the ship *James*, on a voyage at and from *Buenos Ayres* to *London*.—The declaration contained two special counts on the policy, in the first of which the interest was averred to have been in *John Hodgson*, and in the second in *Frederick Dickson* and *William Hodgson*. In both these counts, there was averred to have been a total loss by capture;—the declaration also contained the common money counts.—The defendant pleaded the general issue of *non assumpsit*; and gave a notice of set-off, on which issue was joined.—At the trial of the cause before Mr. Justice *Burroughs*, at *Guildhall*, at the first sittings in this term, it appeared that the *James*, having taken a cargo of hides on board, at *Buenos Ayres*, sailed from thence for *London*, in *June*, 1814, and that on the 28th of *August* following, she was captured by an *American* privateer. In the month of *September*, the plaintiffs having received information of the capture,

The defendant, with several other underwriters, in *Aug.* 1814, subscribed a policy on hides from *Buenos Ayres* to *London*. The ship was captured, and the plaintiffs abandoned the cargo to the underwriters, and claimed a total loss. Some time after, the ship was recaptured, and all the underwriters, but the defendant, on the 19th of *October*, 1814, adjusted a salvage loss, deducting short interest, to the amount of £64. 18s. 3d. *per cent.* which they paid. The defendant, on the 7th of *February*, 1815, adjusted £33. *per cent.* on account of his subscription to

the policy, until the account of the goods insured could be made up, when a final loss was to be paid to the same amount as by the other underwriters, and if the same exceeded £33 *per cent.* the defendant was to pay the excess, if short the insured to return the difference.—*Held*, in an action to recover such loss, that this was a conditional, and not an absolute adjustment, and as the plaintiffs had not proved that the account of the goods insured had been made up, they were not entitled to recover; and that the defendant was not bound by the former adjustment of the other underwriters.

The declaration contained two counts on the policy, averring a total loss by capture. It seems that the plaintiffs should have declared specially on the defendant's adjustment.

1817.  
 GAMMON  
 v.  
 BEVERLEY.

abandoned the hides insured to the defendant and the other underwriters, and claimed from them payment of a total loss. In the following month of *November*, information was received, that the *James* had been re-captured and carried into *Newfoundland*; part of the hides insured were sold there to pay the salvage and expences, and the remainder of the cargo forwarded to this country, where it arrived in due course. Notwithstanding the re-capture, the plaintiffs insisted on holding their abandonment, and the underwriters agreed to pay a salvage loss, deducting short interest, and by a memorandum indorsed on the policy, dated the 19th *October*, 1814, it appeared that they all, except the defendant, adjusted such loss, to £64 : 18s. : 3d. *per cent.*, payable in one month. On the defendant's refusal to pay, an action was brought against him in *Hilary* term, 1815, to recover payment of his subscription, as for a salvage loss, and at the same time a declaration was delivered.—An arrangement then took place between the plaintiffs and defendant, and an indorsement, of which the following is a copy, was written upon the policy, immediately below the subscriptions.

‘ Adjusted £33. *per cent.*, on account, upon my subscription to this policy, until the account of the proceeds of the goods insured can be made up, when a final loss is to be paid to the same amount as by the other underwriters, and if the same exceed £33. *per cent.* Mr. *Beverley* (the defendant) to pay the excess. If short, Mr. *Hodgson* (the insured) to return the difference.  
 ‘ *London 7th Feb., 1815.*’

‘ In account with plaintiffs,’

(Signed) ‘ *Byrd Beverly*.’

The plaintiffs having proved the defendant's hand-



writing to the above indorsement, and that all the other underwriters had paid a loss of £64. : 18s. : 3d. *per cent.* closed their case: when it was insisted for the defendant, that they could not recover in the present action, as his indorsement on the policy was not in the nature of an absolute or general, but of a conditional adjustment; and that it could have no effect until the conditions contained therein had been performed. That although the other underwriters had paid £64. : 18s. : 3d. *per cent.*, still that the defendant could not be called on to pay, until the account of the proceeds of the goods insured had been made up, and which the plaintiffs had not proved to have been done. As the other underwriters had paid for a salvage loss, deducting short interest, as between them and the plaintiffs, there was no account of the proceeds of the goods to be made up. That although the plaintiffs were entitled to recover from the other underwriters, still that their adjustment could not affect the defendant, because he had not agreed to be bound by their acts; and though they had paid as for a salvage loss, it was merely an average one, and there was no pretence to say that it could be converted to a salvage loss. It was also submitted that in order to entitle the plaintiffs to recover, they should have declared on the memorandum specially, with the necessary averments, and that not having done so, they must necessarily be nonsuited, as it was, at the utmost, but an agreement by the defendant to pay upon certain terms and conditions, *namely*, when the account of the proceeds of the goods insured could be made up, and then only to the extent the other underwriters should pay.—The learned judge, however, thought that as all the other underwriters had paid a salvage loss, of £64. : 18s. : 3d. before the memorandum of the defendant was indorsed on the policy, that the plaintiffs were entitled to recover, as the short interest

1817.

GAMMON  
v.  
BEVERLEY.

1817.  
  
 GAMMON  
 v.  
 BEVERLEY.

was known to the defendant, as well as the other underwriters, who adjusted the loss, and that the former was therefore equally liable. The jury consequently found a verdict for the plaintiffs, for £95. : 14s. : 9d., being at the rate of £64. : 18s. : 3d. *per cent.*, but the points raised as to the effect of the memorandum were reserved.

Mr. Serjt. *Best*, (and Mr. Serjt. *Hullock* was with him) having, accordingly, on a former day obtained a rule  *nisi*, that this verdict should be set aside and a nonsuit entered, or that a new trial should be granted;

Mr Serjt. *Lens* now shewed cause, and premised that it was quite unnecessary to declare specially on the adjustment; as Lord *Ellenborough* in the case of *Herbert v. Champion* (a), expressed a clear opinion that an adjustment is merely an admission on the supposition of the truth of certain facts stated, that the assured are entitled to recover. It is, in fact, only *primâ facie*, and not conclusive evidence of the transaction against the underwriter. The memorandum here, coupled with the facts of the case, *primâ facie* shew that the plaintiffs had a right to recover, as on an absolute adjustment. They were therefore clearly entitled to claim from the defendant the same sum as the other underwriters had paid. It appeared evident upon the face of the defendant's adjustment, that the loss was to be made up as a salvage, and not an average loss, because if it had been an average loss, the proceeds of the goods would have had nothing to do with it. The very substance of the memorandum was, that the defendant agreed to pay the same sum as the other underwriters on the policy. It was immaterial whether the adjustment of the other underwriters was

---

(a) 1 *Camp.* 134.—See also Mr. *Campbell's* note in the case of *Shepherd v. Chewter*, 1 *Camp.* 276.

antecedent to that of the defendant, as payments were made by them at different times, and some of those payments took place subsequently to the date of the memorandum of the defendant, in which he adjusted a loss of £33. *per cent.*, on account, upon his subscription to the policy, and that the final loss should be paid to the same amount as by the other underwriters, and if the same should exceed £33. *per cent.*, then the defendant was to pay the excess, and if short, the insured was to return the difference. It was wholly unnecessary for the plaintiffs to have a formal written account of the proceeds of the goods made up and delivered to the defendant, as the other underwriters had previously adjusted the loss, and paid £64. : 18s. : 3d. *per cent.* The account was, to all intents and purposes, the previous adjustment, and the other underwriters having paid the loss according to the terms of such adjustment, the plaintiffs were entitled to recover. It is true that they would have no remedy against the defendant, if the previous account had been improperly made up by the other underwriters; but as that was not the case, he is bound by their payments, and unless such account were done away with, the defendant cannot refuse payment. The substance of his agreement was to pay a final loss to the same amount as the other underwriters; it was therefore unnecessary that a formal account should be made up for him, for the final loss having been ascertained, and the other underwriters having complied with it by treating it as a salvage loss, and made their payments accordingly, unless such account were fraudulent, the plaintiffs were clearly entitled to retain their verdict.

Mr. Serjt. *Best*, and Mr. Serjt. *Hullock*, in support of the rule, stated that there were two questions to be considered; *first*, as to the construction of the defendant's

1817.  
  
 GAMMON  
 &  
 BEVERLEY.

1817.  
 GAMMON  
 v.  
 BEVERLEY.

indorsement on the policy, on the 7th of *February*, 1814; and, *secondly*, whether, to entitle the plaintiffs to recover, they should not have declared on it specially. To the first they raised two objections; namely, that the plaintiff had not proved that the account of the proceeds of the goods insured had been made up, and delivered to the defendant; nor had the other underwriters paid on the footing of such account, but on a salvage loss, deducting short interest. It was not the intention of the defendant to pay as the other underwriters had done; but when the account of the proceeds was ascertained, then he agreed to pay a final loss to the same amount as they might do. The defendant contended that he was only liable to an average loss, and adjusted £33. *per cent.* on account of such loss;—he, therefore, considered that something ulterior was to be ascertained, when he agreed to pay a final loss, as the other underwriters. They had all adjusted for a salvage loss between three and four months before the defendant indorsed the memorandum in question on the policy. He, therefore, did not acquiesce with them in their former adjustment, but agreed that if the final loss paid by them exceeded £33. *per cent.*, he would pay the excess; if short, the insured was to return the difference. When, therefore, the precise amount was ascertained, it could only be considered as an average loss, whereas they had settled as for a salvage loss, deducting short interest.—The defendant, when the account of the proceeds had been made up, might either be obliged to pay the excess, or entitled to receive the difference. If an action had been brought against him immediately on his signing the memorandum, could it have been contended that his liability would then attach, on the ground that the other underwriters had settled and paid their losses as on the policy? This memorandum

was not an adjustment, but a special agreement to pay on a certain event; namely, on being furnished with an account of the proceeds made up, the defendant agreed to pay a final loss to the same amount as the other underwriters. This the plaintiffs did not prove at the trial, and the defendant could not be liable to pay, until he had been furnished with the account, for it was in the nature of a condition precedent, which they were bound to perform. They did not even prove that any account whatever had been given to the defendant. It has been assumed for the plaintiffs, that the account had been made up by the adjustment that had been made by the other underwriters; but they had undertaken to pay, and many of them had paid before the defendant indorsed the memorandum in question on the policy. They had not paid on account, but settled as for a distinct salvage loss;—but the very terms of this agreement imply the proceeds of the cargo to be carried to account, and as such account has not been proved to have been given to the defendant, he is not liable to pay.—*Secondly*; the plaintiffs cannot recover on the declaration as it now stands, as the memorandum on the policy signed by the defendant is not in the nature of an adjustment, but a special agreement; as an adjustment is a mere admission of the party of the loss and other circumstances which have taken place; but this agreement contained a condition precedent, which the plaintiffs should have averred to have been performed on their parts, before they were entitled to recover.

Mr. Justice DALLAS.—This case is not altogether so free from difficulty, that, had it come before me at *Nisi Prius*, I should have felt somewhat embarrassed; but as the points contained in it have been so fully and ably discussed, I do not now hesitate to declare my opinion.

1817.  
 GAMMON  
 v.  
 BEVERLEY.

1817.

GAMMON

v.

BEVERLEY.

There can be no doubt, but that in the case of an absolute adjustment, an underwriter is liable to pay the amount of the indemnity which the assured is entitled to receive under the policy, which amount is to be explained by the adjustment. It has been objected that the plaintiffs have not adduced evidence to prove the defendant's liability to pay;—if the memorandum indorsed on the policy and signed by him was absolute, he would have been liable.—The question then is, whether either on the face, or by the terms of this instrument, it is an absolute or conditional adjustment;—if it be conditional, the terms it contains are in the nature of a condition precedent, and should therefore have been complied with by the plaintiffs, in order to entitle them to recover.—Neither in terms, or substance, can this be an absolute adjustment. If the memorandum had been ‘adjusted £33. *per cent.* on account, upon the defendant's subscription to the policy,’ it would have amounted to an absolute adjustment;—but the subsequent terms have a prospective view, *namely*, ‘until the account of the goods insured can be made up.’ The word *until* is clearly prospective, and *can* is equally so. On the face of the memorandum, therefore, the undertaking of the defendant appears to be prospective, and that his subsequent liability depended on the making up of the account; but it is not merely prospective in this respect, but goes still further, for when the account was made up, a final loss was to be paid to the same amount as by the other underwriters, and if the same exceeded £33. *per cent.*, the defendant was to pay the excess;—if short, the insured was to return the difference. Throughout, therefore, it was entirely prospective, and shewed that something remained to be done, and more particularly so, as all the other underwriters had adjusted and paid their

losses long before. If, therefore, the defendant was to be bound by what the other underwriters had done, there would have been no necessity for an account to have been made up, for they had excluded themselves from having an account rendered to them by the terms of their adjustment of the 19th *October*, 1814.—As, therefore, the defendant's liability could only attach, when the account was made up, and as the adjustment settled by the other underwriters was not conclusive on him, as it was made nearly four months before he signed the memorandum in question, and as his name only remained on the policy, the plaintiffs should have proved that they had made up and rendered to him an account of the proceeds. The undertaking by the defendant to pay the final loss to the same amount as the other underwriters, is qualified by the former part of the adjustment, which involved a condition precedent which has not been performed by the plaintiffs.

Mr. Justice PARK.—Although I might entertain some doubt, in giving an immediate opinion on this point, I have now no hesitation in doing so, as I consider the conclusion my brother *Dallas* has drawn to be perfectly correct. The words *until*, and *can*, in the memorandum, clearly shew that it was the intention of the parties, that something was to be done in future. The adjustment made by the other underwriters on the policy, was dated in *October*, 1814, and it is quite immaterial whether they had paid or not, because their adjustment was absolute and final. The defendant, in *February*, 1815, adjusted £38. *per cent.*, on account ;—if he was bound to pay the same loss as the other underwriters had before agreed to, he would, of course, have acceded to their adjustment of £64. : 18s. : 3d.—It appears, by the instrument in question, that the defendant required further information,

1817.  
  
 GAMMON  
 v.  
 BEVERLEY.

1817.  
 GAMMON  
 v.  
 BEVERLEY.

and although all the other underwriters had adjusted for £64. : 18s. : 3d., still he paid only £33 *per cent.*, on account, until the account of the proceeds of the goods insured could be made up, that must mean when the account was ascertained and written out; when a final loss was to be paid to the same amount as by the other underwriters, and if the same exceeded £33. *per cent.*, the defendant undertook to pay the excess; if short, the insured agreed to return the difference. The defendant, therefore, did not contemplate to pay as the other underwriters had done, for he even considered that the final loss might not amount to £33. *per cent.*, and if it did not, the insured agreed to return the difference. It is, at all events, therefore, a mere impossibility that he should be concluded by the previous acts of the other underwriters; and yet, the jury have found a verdict for the plaintiffs, as though the loss had amounted to £64. : 18s. : 3d. *per cent.*—Since, therefore, the defendant thought that the final loss might not even amount to £33. *per cent.*, and as the plaintiffs have not proved that they had made up the account, I think they are not entitled to recover. It is therefore unnecessary to say any thing as to the objection raised as to the insufficiency of the declaration, yet I think that this is merely a conditional and not an absolute adjustment.

Mr. Justice BURROUGH.—I did not intend to have delivered my sentiments on this question, but feel it a duty to the court and bar, to say that I perfectly coincide with my brother *Dallas* and my brother *Park*, in the conclusions they have drawn. The grounds on which I founded my opinion at the trial were, that the adjustment had been made by all the other underwriters more than three years before the cause was tried, and I thought the substance of the agreement was for the defendant to pay



the same loss as they had previously adjusted. No question arose whether they were dissatisfied or not, and I therefore thought the defendant equally liable.—I am extremely happy that I reserved the point.

1817.  
GAMMON  
v.  
BEVERLEY.

Rule Absolute, for a non-suit.

WALLBANK v. ABBOTT.

Friday,  
Nov. 28th.

MR. Serjt. *Best*, on a former day, had obtained a rule *nisi*, for setting aside the declaration in this cause, with all subsequent proceedings for irregularity; on the ground that the defendant was served with notice of the declaration before the service of the writ. It appeared, that the defendant was served with a copy of a *capias*, at eight o'clock in the evening of the 25th instant, returnable the last return of this term, and on the following morning with notice, dated the preceding day, of a declaration having been filed conditionally against him.

Notice of a declaration having been filed *de bene esse*, may be given on the return day of the writ, at the time of serving it; but notice cannot be given on that day, of a declaration having been filed in chief.

Mr. Serjt. *Pell* now shewed cause, and relied on the case of *Haynes v. Jones* (a), where it was held that a writ might be served on the day on which it was returnable, and notice of declaration might be given at the same time. The subsequent case of *Pope v. Turner* (b), where it is said that a defendant, who is served with process and notice of declaration both on the return day of the writ, may treat the declaration and notice as a nullity; although it appears in express contradiction to, is altogether distinguishable from that of *Haynes v. Jones*; for in the

(a) 3 Taunt. 404.—(b) 4 Taunt. 818.

1817.  
 WALLBANK  
 v.  
 ABBOTT.

latter, the declaration was filed conditionally, and in *Pope v. Turner*, the defendant was served with a notice of declaration in chief, within an hour after the service of the writ. Here, the defendant was not served with notice until the following morning, that a declaration was filed conditionally against him, although such notice was dated on the preceding day, on which he was served with the writ. He also objected that the defendant was too late to take advantage of their regularity, even if the declaration had been improperly filed, and relied on the case of *Fletcher v. Wells* (a).

Mr. Serjt. *Best*, in support of his rule, submitted, that the service of the notice of the declaration was wholly irregular, and that the case of *Haynes v. Jones* was overturned by the subsequent decision, in that of *Pope v. Turner*.—The writ was not returnable until the 27th, and the notice stated that the declaration was filed conditionally on the 25th, when the writ was served.

Mr. Justice DALLAS.—The case of *Haynes v. Jones* is not overturned by that of *Pope v. Turner*, although, by the marginal abstracts, they appear to be wholly inconsistent with each other; for in the one, the declaration was filed conditionally, and in the other in chief.—The facts in *Haynes v. Jones* are stronger than in the present case, for there the defendant was served at *Colchester*, with a copy of a writ, returnable on that day, and at the same time (b) he was served with a notice, dated the same day, of a declaration having been filed conditionally against him; and the officers of the court there said, that a writ might be served on the same day on which it was returnable, and that a declaration might be filed on the re-

---

(a) 1 *Marsh.* 550.

(b) But see *Steward v. Lund*, 12 *E. R.* 116, where the court of *King's Bench* held, that there must be some interval, however short, between the service of the writ and notice of declaration.

turn day of the writ. I therefore think that the service in this case was perfectly regular.

Mr. Justice PARK.—If the notice of declaration had been served before the writ, it would clearly have been irregular; but this was not the case, for the defendant was served with a copy of a *capias*, on the evening of the 25th, and with a notice of a declaration having been filed, conditionally, on the following morning; my brother *Dallas* has fully explained the apparent inconsistency between the cases of *Haynes v. Jones* and *Pope v. Turner*, and I think the proceedings in the present case were conformable to the practice of the court; and, consequently, regular.

Mr. Justice BURROUGH concurred.

Rule discharged, with costs (a).

---

(a) But the proceedings in this case were clearly irregular, for where a writ is returnable the *last* return of the term, the declaration must be filed, or delivered on the day of such return, or on the day following, or the defendant is entitled to an imparlance.—

*Reg. Gen. Hil. 35 Geo. 3. 2 H. Bl. 551.*

1817.

WALLBANK  
v.  
ABBOTT.

END OF MICHAELMAS TERM.

# INDEX

Page

Introduction ..... 1

Chapter I

1. The History of the English Language ..... 1

2. The English Language

3. The English Language

4. The English Language

5. The English Language

6. The English Language

7. The English Language

8. The English Language

9. The English Language

10. The English Language

11. The English Language

12. The English Language

13. The English Language

14. The English Language

15. The English Language

16. The English Language

17. The English Language

18. The English Language

19. The English Language

20. The English Language

AN  
**I N D E X**  
TO THE  
PRINCIPAL MATTERS.

---

**ABANDONMENT.**

*See* INSURANCE, 6.

**ABATEMENT.**

1. If an *Irish* peer be sued by bill, the court will not set aside the proceedings on motion; but leave him to plead his privilege in abatement. *Davies v. Lord Rendlesham.* T. 57 G. 3. Page 410

**ACCOUNT.**

*See* INSURANCE, 6.

**ACCOUNT—BALANCE OF.**

*See* BANKRUPT, 5.

**ACCOUNT STATED.**

*See* PLEADING, 10.

**AC ETIAM.**

*See* PRACTICE, 4.

VOL. I.

**ACKNOWLEDGMENT OF DEBT.**

*See* LIMITATION OF ACTIONS, 1.

**ACT OF PARLIAMENT.**

*See* REVERSION.  
STATUTES.

**ACTION—FORM OF.**

*See* ACTION ON THE CASE, 1.

**ACTION ON THE CASE.**

1. In an action of trespass by husband and wife, in which they declared that the defendant drove a chaise against another chaise, in which the wife was then riding, whereby she was thrown out, and sustained an injury.—On a motion in arrest of judgment:—*Held*, that the plaintiff's remedy was trespass, and not case, and that it was unnecessary to state to whom the plaintiff's chaise belonged, at the time the accident

P P

happened. *Hopper and Wife v. Reeve*. T. 57 G. 3. Page 407

2. An action on the case for permissive waste is not maintainable against a tenant for years, if he hold premises under an express contract or covenant to repair. *Jones v. Hill*, E. 57 G. 3. 100
3. The defendant, being the owner and occupier of certain woodlands adjoining and divided from another woodland of J. T. by an insufficient fence to prevent dogs from passing from one woodland to the other, through which woodland of the defendant there were several public footpaths, not fenced off; the defendant, for the preservation of hares in his woodland and to destroy dogs and foxes which might come in pursuit of them, fixed iron spikes, called dog-spears, sharp at each end, into several trees, under which a hare might pass without injury, but a dog in pursuing such hare would be liable either to be wounded or killed. None of these spikes were at a less distance than fifty yards from any of the footpaths, with each end pointing along a haretrack. On the outside of the defendant's woodland were placed painted notices, that "steel-traps, spring-guns, and dog-spikes, and also spring-traps for vermin, were set therein."—The plaintiff was sporting, by permission, in the woodland of J. T. with a pointer dog, where a hare was started and pursued by his dog into the woodland of the defendant. Although the plaintiff used every means in his power to prevent such pursuit, the dog entered the woodland of the defendant, ran against one of the spikes, and was killed. The plaintiff having brought an action on the case against the defendant

to recover damages for the loss of his dog, the court were equally divided in opinion, whether the defendant were authorised in fixing the dog-spears, or whether he were answerable to the plaintiff for damages for the loss of his dog. *Deane v. Sir William Clayton, bart.*, E. 57 G. 3. Page 203

## ADJUSTMENT.

See INSURANCE, 6.

## ADMINISTRATOR.

See INFANT, 1.

## ADMISSION OF DEBT.

See LIMITATION OF ACTIONS, 1.

## AFFIDAVIT.

1. An affidavit, tending to impeach a verdict, through the misconduct of one of the jurors, cannot be received after trial. *Hindle v. Birch, and another*, M. 58 G. 3. 455
2. If one part only of an indenture of apprenticeship be executed by the plaintiff and defendant, and sworn to be in the possession of the latter:—*Held*, on a notice given by the plaintiff to produce it, that an affidavit of the defendant, stating that he had no such indenture in his possession, and that he had not divested himself of it, nor destroyed it, and that he did not know in whose possession it was, or what had become of it, was insufficient, for that he should have stated that it never existed, that he had never possessed it, or that he had not been enabled to find it. *Cooke v. Tanswell*. M. 58 G. 3. 465

## AFFIDAVIT TO HOLD TO BAIL.

See BAIL, 2.  
PRACTICE, 3.

1. An affidavit of debt, stating that the defendant is indebted to the plaintiffs in the sum of £3000, for principal and interest due on a bond, is sufficient to express that such bond is conditioned for the payment of money, without setting forth the condition. *Byland and Wife v. King*, H. 57 G. 3. Page 24
2. If an assignee of a bond positively negative a tender in bank notes, it is unnecessary for the obligee to join in such affidavit. *Byland and wife v. King*, H. 57 G. 3. 24
3. An affidavit of debt stated the defendant to be indebted to the plaintiff generally, on a bond conditioned for the performance of an award, which award directed one E. F. to pay a sum of money on demand:—*Held*, that such affidavit was defective, as it did not appear how the defendant was indebted, and that no demand was expressed to have been made on E. F. for payment. And the court would not allow a supplemental affidavit. *Armstrong and others, assignees of Nias and White, bankrupts, v. Stratton*. E. 57 G. 3. 110

## AGENT.

See BILLS OF EXCHANGE, 5, 6.  
BROKER, 1.  
CARRIER, 1.  
CHARTER-PARTY, 2.  
EVIDENCE, 1.  
MONEY HAD AND RECEIVED, 1.

1. Where persons have received money for the express purpose of taking up a bill of exchange, two days after it became due, and

upon tendering it to the holders and demanding the bill, find that they have sent it back protested for non-acceptance to the persons who indorsed it to them:—*Held*, that such persons having received fresh orders not to pay the bill, were not liable to an action by the holders for money had and received, when, upon the bill being reprocurd and tendered to them, they refused to pay the money. *Stewart and another, v. Fry and another*, H. 57 G. 3. Page 74

2. If a person employed by ship-owners, as their agent, effect a policy of insurance, and represent himself as the principal to the brokers, who cause such insurance to be effected:—*Held*, that if the brokers receive the amount of the loss from the underwriters and pay it over to the agent, they are not liable to the owners, in an action for money had and received, although part of the money was paid to the agent after they were informed of his having acted in that capacity. *Bell, and others, v. Jutting, and another*, E. 57 G. 3. 155

## AGREEMENT.

See BILLS OF EXCHANGE, 4.

## ALIEN.

1. If cambrie of French manufacture be assigned to merchants in England for sale, and bills of exchange be drawn on them by an alien enemy, resident in France, during war, which they accept:—*Held*, that the drawer having indorsed those bills to a British subject, residing in France, does not enable such British subject to recover on the bills against the acceptors, after the restoration of

peace. *Willison v. Patteson and others*, E. 57 G. 3. Page 133

## ALTERATION.

See CHARTER-PARTY, 2.  
INSURANCE, 1.

## AMENDMENT.

Of Fines, See *tit.* FINE.  
Of Recoveries, See *tit.* RECOVERY.

1. A bailable, and not a *testatum capias*, was issued into *Durham*, and signed by the filacer for that county. The defendant was arrested, and put in bail as upon a *testatum*. A declaration was afterwards delivered, in which the venue was laid in *Lincolnshire*. A recognizance of bail was entered into in *Middlesex*; and a declaration on such recognizance was afterwards delivered, to which the defendant pleaded. On a motion to amend the entry of the recognizance from *London* to *Durham*:—*Held*, that the defendant having submitted to the arrest, and put in and got bail allowed, as upon a *testatum capias*, had waived the irregularity, and the court refused to interfere, but left the party to his ordinary remedy, and expressed their opinion that such writs ought not to issue in future. *Hartley v. Hodson*, M. 58 G. 3. 514

## AMERICAN EMBARGO ACT.

See INSURANCE, 2.

## ANNUITY.

See LIMITATION OF ACTIONS, 1.

## ARBITRATION.

## APOTHECARY.

1. In an action for a libel upon the plaintiff, who had served upwards of three years as house-apothecary at a public infirmary, before the passing of the statute 55 G. 3. c. 194:—*Held*, that such service was sufficient to qualify him to act as an apothecary, and superseded the necessity of an apprenticeship, or the production of a certificate, in conformity with the regulations of that statute. *Wogan v. Somerville*, E. 57 G. 3. Page 102

## APPEARANCE.

See INFANT, 1.  
PRACTICE, 9.

## APPRENTICE.

See APOTHECARY, 1.

## APPRENTICESHIP—INDENTURE OF.

See AFFIDAVIT, 2.

## ARBITRATION.

See AFFIDAVIT TO HOLD TO BAIL, 2.  
COSTS, 2.  
PRISONER, 2.

1. Where a court of sessions referred an indictment for an assault to an arbitrator, and empowered him to settle all costs incident to the indictment and subsequent proceedings thereon:—*Held*, that such arbitrator did not exceed his authority, by awarding the previous as well as subsequent costs. *Baker v. Townsend*, E. 57 G. 3. 120

2. If a party has preferred an indictment for an assault:—*Held*, that he may submit the adjust-



## ARBITRATION.

- ment of the reparation to arbitration, as well as the costs. *Baker v. Townsend, E. 57 G. 3. Page 120*
3. An action was commenced against two defendants, as partners, resident abroad.—The plaintiff proceeded to and obtained outlawry; the partnership being dissolved, one of the defendants arrived in England, and was arrested on a *capias utlagatum*.—A rule was obtained for reversing the outlawry. By an order of reference all matters in difference between the parties were submitted to an arbitrator, who refused to consider the claims of the defendants, respecting the outlawry, but confined himself to the action commenced against them:—*Held*, that he was not bound to take the outlawry into consideration, as no joint specific injury was stated to have been sustained by both the defendants, and the court refused to set aside the award. *Garland and another, (surviving partners of Baker, deceased) v. Noble and another, E. 57 G. 3. 187*
4. Where a verdict was taken for the plaintiff, by consent, subject to the award of an arbitrator, such reference being authorised by an order of *nisi prius*, and the defendant died after the verdict, but before the award, and the arbitrator, after such death, made his award, ordering a verdict to be entered for the defendant:—*Held*, that such award was bad, as the death of the defendant was a revocation of the arbitrator's authority. *Toussaint v. Hartop, T. 57 G. 3. 287*
5. An arbitrator to whom all actions and causes of action, and all matters in difference whatsoever, in two actions subsisting between the same parties, have been referred,

## ASSIGNEE OF BOND. 561

is not compelled to take matters of an equitable nature into consideration, but an award made by him in reference to the two actions only is final. *Craven v. Craven, T. 57 G. 3. Page 403*

## ARREST.

See AMENDMENT, 1.  
ARBITRATION, 3.  
PRACTICE, 3, 4, 12.

1. A capital Burgess of a borough, attending an election of co-burgesses, under a summons from the mayor, issued in obedience to a *mandamus*, directing the corporation to proceed to such election, is not privileged from arrest during his attendance there for that purpose. *Nixon and Reed v. Burt, clerk, T. 57 G. 3. 413*

## ARREST OF JUDGEMNT.

See ACTION ON THE CASE, 1.  
PLEADING, 15, 18.

## ASSAULT.

See ARBITRATION, 1.  
COSTS, 4.

## ASSETS.

See PLEADING, 10.

## ASSIGNEE OF BANKRUPT.

See BANKRUPT.  
CARRIER, 1.  
EXECUTION, 1.  
SET-OFF, 1.

## ASSIGNEE OF BOND.

See AFFIDAVIT TO HOLD TO BAIL, 1.  
SHERIFF, 1.

## ASSIGNEE OF LEASE.

See LEASE, 1.

## ASSIGNMENT.

See EXECUTION, 2.

## ASSIGNMENT OF BREACHES.

See REPLEVIN, 1.

## ASSUMPSIT.

See LIMITATION OF ACTIONS, 1.  
MONEY HAD AND RECEIVED.  
PLEADING, 2, 3, 4, 9, 10, 18.  
SHIP, 1.  
VARIANCE, 4.

1. Where a bill of exchange is given in payment for goods sold, which, upon presentment to the drawee, is refused acceptance:—*Held*, that the holder having declared against the drawer on the bill, and joined counts for goods sold, may treat such bill as a nullity, and recover his demand on the latter counts although the credit on the bill be not expired. It is sufficient in such an action to prove a presentment to the drawee for acceptance, without shewing that the bill was protested for non-acceptance, or that the drawer had notice of its dishonour. *Hickling and another v. Hardey*, H. 57 G. 3. Page 61

## ATTACHMENT.

See PRISONER, 2.

## ATTORNEY.

See INFANT, 1.  
PRACTICE, 12.

1. Where deeds are delivered to an attorney, by A. and B. jointly, for the purpose of carrying on a suit in the Exchequer.—The court, upon motion by A. alone, will not order

such deeds to be delivered up, on payment of the debt and costs by him, as they could not bring B. before them, nor bind his rights in his absence. *Duncan, gent., one, &c. v. Richmond*, H. 57 G. 3. Page 99

## ATTORNEY'S BILL.

See LIMITATION OF ACTIONS, 1.

## AUCTION.

See PLEADING, 18.

## AUCTIONEER.

See INTEREST, 1, 2.

## AUTHORITY.

See ARBITRATION, 3.

## AWARD.

See ARBITRATION.

## BAIL.

1. Where the same persons are bail in two actions on the same bill of exchange, they are only bound to justify in double the amount of the sum sworn to in each action, and not in double the amount of the sum sworn to in both actions. *Reed, and others, v. Ellis and Cornfoot*, H. 57 G. 3. 29
2. Where an affidavit to hold to bail is for £167, and upwards, on a bill of exchange only, and the plaintiff recovers a general verdict for a greater amount, as well on the bill as for goods sold, the bail are only liable for so much as is recovered on the bill of exchange; and it seems that the payment of such sum, with costs, by one of the bail, is a discharge of the other. *Whechwright, and another, v. Jutting, bail of Fles*, H. 57 G. 3. 51

## BALANCE OF ACCOUNT.

3. The plaintiff issued execution in an action of ejectment after writ of error brought by the defendant, on the ground, that although the defendant had entered into a recognizance, in compliance with the stat. 16 and 17 Car. 2. c. 8, he had not given notice of the terms of such recognizance. But the court, finding that those terms were such as had been invariably used, thought a notice unnecessary; and, consequently, set aside the execution with costs. *Doe d. Webb v. Goundry*, E. 57 G. 3. Page 118
4. The misnomer of a christian name of one of the bail in a recognizance and notice is fatal. *Anonymous*, E. 57 G. 3. 125
5. The plaintiffs sued out a *ca. sa.* against a principal, who having put in bail, became bankrupt, and obtained his certificate; they afterwards agreed to accept a composition, provided all his creditors would accept the same, of which the bail had no notice:—*Held*, that the *ca. sa.* against the principal should be set aside, and that as the bail had not applied to enter an *exoneretur* on the bail-piece until after execution had been levied on them, they could only be relieved on payment of costs. *Thackrey and others v. Turner*, M. 58 G. 3. 457
6. The court permitted a person to justify as bail, although he did not reside in the house in which he was described in the notice. *Hemming v. Plenty*, M. 58 G. 3. 529

## BAIL-PIECE.

See BAIL, 5.

## BALANCE OF ACCOUNT.

See BANKRUPT, 5.

## BANKRUPT.

583

### BANKER.

See BANKRUPT, 1.  
LIEN, 1.

### BANKRUPT.

See BAIL, 5.  
CARRIERS, 1.  
EXECUTION, 1.  
SET-OFF, 1.  
VARIANCE, 2.  
WITNESS, 2.

1. Where A. having occasion to borrow money of B., leaves with him as a collateral security warrants of the *West-India Dock* company, for sugars deposited in their warehouses, and entered in his name in their books, and afterwards becomes bankrupt:—*Held*, that A. had not such a possession of the sugars as would enable his assignees to maintain trover for them, as the transfer of the warrants was a complete transfer of the possession, before the bankruptcy, so as to take the case out of the statute, 21 Jac. 1. c. 19. s. 11. *Lucas, and others, assignees of Doorman, bankrupt, v. Dorrien, and others*, H. 57 G. 3. Page 29
2. If a surety enter into a bond with a principal, conditioned for the performance of covenants contained in an agreement for a lease, such surety is still liable, although the principal become bankrupt, and be discharged under the 49 G. 3. c. 121. s. 19. *Ingdis v. Macdougall*, E. 57 G. 3. 195
3. An action of trover cannot be maintained by the assignees of a bankrupt, to recover bills of exchange from the holder, who drew them with a knowledge of the bankrupt's insolvency, and after compelling such bankrupt to sign, induced his debtors, who were not

aware of his circumstances, to accept them. *Walker, and another, assignees of Dunn, a bankrupt, v. Laing, T. 57 G. 3.* Page 281

4. A petitioning creditor cannot dispute the validity of a commission of bankrupt, sued out by himself, although in an action brought against him by the assignees, it appear, that on the balance of accounts, the bankrupt was indebted to such petitioning creditor, in a less sum than £100. *Harmer, and another, assignees of Edward Davis, a bankrupt, v. Gilbert Davis, T. 57 G. 3.* 300

5. If a person, previous to his bankruptcy, deposit a bill of exchange with a defendant for the purpose of raising money thereon, and an advance is accordingly made:—*Held*, that the assignees of such bankrupt were entitled to recover the bill in an action of trover, on having tendered the money advanced, although a balance remained due from the bankrupt to the defendant, on a general account; and that this, therefore, was not a case of mutual trust, or credit, within the statute, 5 G. 2. c. 30. s. 28. *Key, and others, assignees of Robinson, and another, v. Flint, M. 58 G. 3.* 451

6. Goods were sent from London to Sunderland, upon sale or return, and a letter inclosing an invoice requested the buyer to return such of them as were not approved by him in as short a time as possible. The goods arrived at the shop of the buyer, on the evening of the 13th of November, and on the following day he committed an act of bankruptcy. In an action of trover, brought by the seller against the assignees to recover these goods:—*Held*, that they did not pass to such assignees under the statute,

21 Jac. 1. cap. 19. s. 11, as the bankrupt should have been allowed a reasonable time to have selected such goods as he was disposed to retain. *Gibson v. Bray and another, M. 58 G. 3.* Page 519

## BARON AND FEME.

1. A declaration in *assumpsit* against husband and wife, on the common money counts, one of which alleged that the husband was indebted for money lent to the wife, at her request was held bad on writ of error, and the judgment given for the plaintiff, below, was reversed. *Stone v. Macnair, E. 57 G. 3.* 126
2. In an action of trespass, by husband and wife, in which they declared that the defendant drove a chaise against another chaise, in which the wife was then riding, whereby she was thrown out, and sustained an injury. On a motion in arrest of judgment:—*Held*, that the plaintiffs' remedy was trespass, and not case, and that it was unnecessary to state to whom the plaintiffs' chaise belonged, at the time the accident happened. *Hopper and Wife v. Reeve, T. 57 G. 3.* 407

## BARRATRY.

See INSURANCE, 5.

## BATTERY.

See COSTS, 4.

## BILLS OF EXCHANGE AND PROMISSORY NOTES.

See BAIL, 2.

BANKRUPT, 3, 5.

INFANT, 2.

MONEY HAD AND RECEIVED, 1.

1. Where a bill of exchange is given in payment for goods sold, which,

- upon presentment to the drawee, is refused acceptance:—*Held*, that the holder having declared against the drawer on the bill, and joined counts for goods sold, may treat such bill as a nullity, and recover his demand on the latter counts, although the credit on the bill be not expired.—It is sufficient, in such an action, to prove a presentment to the drawee for acceptance, without shewing that the bill was protested for non-acceptance, or that the drawer had notice of its dishonour. *Hickling and another, v. Hardey, H. 57 G. 3. Page 61*
2. If cambric of French manufacture be assigned to merchants in England for sale, and bills of exchange be drawn on them by an alien enemy, resident in France, during war, which they accept:—*Held*, that the drawer having indorsed those bills to a British subject, residing in France, does not enable such British subject to recover on the bills against the acceptors, after the restoration of peace. *Willison v. Patteson and others, E. 57 G. 3. 133*
3. The acceptance of a bill of exchange admits merely the drawing, but not the indorsement of the drawer. Therefore, if a bill be drawn and indorsed by procuration; it was held in an action by the indorsee against the acceptor, that as the indorsement by procuration was not proved, they were not entitled to recover. *Robinson and another v. Yarrow, E. 57 G. 3. 150*
4. In an action on a promissory note, indorsed by the defendant to the plaintiffs, payable at twelve months after date, a parol agreement entered into between him and the maker when it was drawn, that it was not to be demanded until

- estates of the maker had been sold, and that the defendant indorsed such note as a surety only, cannot be received in evidence as a waiver of the notice of its dishonour. *Free and another v. Hawkins, M. 58 G. 3. Page 535*
5. Bills of exchange indorsed to an agent of the plaintiffs, or order, for their account, deposited with the defendants by such agent as a security for future advances, may be recovered by the plaintiffs in an action of trover. *Truettel and another, v. Burandon and another, M. 58 G. 3. 543*
6. The defendant drew a bill of exchange at *Marseilles*, on *B.* in *London*, which he accepted, payable to the order of *C.*, who indorsed it to the plaintiffs.—On the bill being dishonoured, the plaintiffs commenced an action against the defendant, it being then held by them as the agents of *C.*—A former bill had been drawn by the defendant on *D.*, which at the time of its dishonour was held by *E.*, who took it up, and having struck out his indorsement, sent it to *F.*, to be forwarded to *G.* and *Co.*, at *Marseilles*, for the purpose of receiving the amount from the defendant.—*G.* and *Co.*, in breach of the trust reposed in them, indorsed it, being over-due at the time, to *C.*, for a valuable consideration.—On *C.*'s demanding payment from the defendant, he drew the bill in question as a substitution for the former, and delivered it to *C.*—Before the latter bill became due, *E.* gave the defendant notice not to pay it.—*Held*, that he was not liable, as the plaintiffs held the bill as the agents of *C.*, and that they could only recover to be accountable to him, and that *C.* had no right to reco-

ver, as the produce of it belonged to E., who had given the defendant notice not to pay it. *Lee and another, v. Zagury, M. 58 G. 3.*  
Page 556

## BOND.

See AFFIDAVIT TO HOLD TO BAIL,

1, 2.

BANKRUPT, 2.

BROKER, 1.

PLEADING, 2.

1. A surety in an indemnity bond may bring an action for contribution against his co-surety, although he had given a subsequent security to the obligees, under which he paid the sum conditioned in the bond, without the knowledge or consent of such co-surety. *Dunn v. Slec, H. 57 G. 3.* 2
2. If, in a bond made in contemplation of marriage, the obligor agree to settle all lands and hereditaments of which he should be seised during his life upon his intended wife, and the issue of the marriage in such parts and proportions, and to such use and uses as should be thought requisite, the better to make a provision for his intended wife, in case she should survive him:—*Held*, that such obligor having survived his wife, by whom he had issue, and married another by whom he also had issue, would not commit a breach of the condition, if he did not make a settlement of property acquired during the second marriage, upon the issue of the first. *Prebble and others v. Boghurst and others, T. 57 G. 3.* 258
3. If, to debt on bond, which contained a condition, that the defendant should not open a shop within a certain distance of pre-

## CAPTURE—LOSS BY.

mises demised in a lease, and the defendant pleaded that he opened a shop by the licence of the plaintiff:—*Held*, that such plea was bad, on general demurrer, on the ground that a licence, after breach, was not good, unless by deed. *Sellers v. Bickford, M. 58 G. 3.*  
Page 460

## BREACHES.

Suggestion of, See REPLEVIN, 1.

## BROKER.

See AGENT, 2.

EVIDENCE, 1.

SET-OFF, 1.

STOPPAGE IN TRANSITU, 1.

1. A broker is authorised from a previous course of dealing between himself and his principal, on an approval of a purchase by the latter, to make out a contract note in his own name, without inserting that of his principal; and under such circumstances, does not violate the bond and oath imposed on him by the regulations of the city of London, provided he make an entry in his book in the name of his principal. *Kemble and others v. Atkins and another, H. 57 G. 3.* 6

## BURGESS.

See ARREST, 1.

## CAPIAS.

See AMENDMENT, 1.

PRACTICE, 4.

## CAPIAS AD SATISFACIENDUM.

See BAIL, 5.

## CAPTURE—LOSS BY.

See INSURANCE, 6.

CARRIER.

1. A trader, in *London*, was in the habit of purchasing goods at *Manchester*, and exporting them to the *Continent* shortly after their arrival in *London*. The goods consigned to him remained in the waggon-office of the defendants, who were carriers, until they were removed by his agent, for the purpose of being shipped:—*Held*, that such trader, having become bankrupt, the assignees were entitled to recover goods deposited with the defendants before the bankruptcy, and that the consignee had no right to stop them in *transitu*, as the trader had no warehouse of his own:—*Held*, also, that the *transitus* of the goods was at an end on their arrival at the waggon-office. *Rowe and another, assignees of Lange, a bankrupt, v. Pickford and another*, *M. 58 G. 3. Page 526*

CERTIFICATE.

*See BAIL, 5.*

CERTIFICATE OF JUDGE.

*See COSTS, 4.*

CHARTER-PARTY.

*See INSURANCE, 2. 5. VENUE, 1.*

1. Where, by a charter-party of affreightment, the freighters covenanted to provide for the ship a full cargo, consisting of cotton wool, rice, or other goods, on which separate rates of freight were to be paid:—*Held*, that it was the duty of such freighters to have shipped goods according to the custom of the country from whence they were imported, although the shippers were put to an expence

- by so doing, and such shipment would exceed the stipulations contained in the charter-party. *Benson v. Schneider and another. P. 21*
2. An obligation by deed cannot be altered but by deed; therefore, in an action of covenant on a charter-party, in which the plaintiff covenanted to sail from *London* to *Gibraltar*, and there to deliver an outward cargo, and receive from the agents of the defendant (as freighter) at *Gibraltar*, or at *Malaga*, *Cadiz*, or *Seville*, as should be ordered by the agents at *Gibraltar*, such goods as the agents might load on board for the homeward cargo, and that the vessel should return direct to the port of *London*, and deliver the homeward cargo, the agents of the defendant at *Gibraltar*, having ordered the plaintiff to proceed to *Cadiz*, at which place other agents directed by parol that the homeward cargo should be delivered at *Liverpool* instead of *London*:—*Held*, that the plaintiff having delivered the cargo at *Liverpool*, and declared in an action of covenant on the charter-party, could not recover the freight, the substitution by parol of *Liverpool* for *London* being inconsistent with the covenant contained in the charter-party. *Thomson v. Brown, T. 57 G. 3. 358*

CLEARANCE AT THE CUSTOM-HOUSE.

*See INSURANCE, 3, 4.*

COCKET.

*See INSURANCE, 3.*

COGNOVIT.

1. If a defendant, on being arrested by a sheriff's officer, give a *cognovit* to the plaintiff, who was the

attorney in the cause, without an attorney being present on his part, such *cognovit* is void, although the plaintiff swore that he was unattended by the officer, and that he did not know that the defendant was in custody at the time the *cognovit* was given. *Webb and Yates v. Aspinall*, T. 57 G. 3. Page 428

## COMMISSION OF BANKRUPT.

See BANKRUPT, 4.  
VARIANCE, 2.

## COMMISSION DEL CREDERE.

See PLEADING, 9.  
SET-OFF, 1.

## COMPOSITION.

See BAIL, 5.

## COMPULSORY CLAUSE.

See PRISONER, 2.

## CONDEMNATION.

See FREIGHT, 1.

## CONDITION OF BOND.

See BANKRUPT, 2.  
BOND, 2, 3.

## CONDITIONS OF SALE.

See PLEADING, 18.

## CONSIGNEE.

See CARRIER, 1.

## CONSOLIDATION RULE.

See PRACTICE, 2.

## CONTRACT.

See INFANT, 2.  
PLEADING, 18.  
VARIANCE, 4.  
WARRANTY, 1.

## CONTRIBUTION.

See BOND, 1.  
REPLEVIN, 1.

## CONVEYANCE OF ESTATES.

See REVERSION, 1.

## CORPORATION.

See ARREST, 1.  
DEVISE, 2.

## COSTS.

See ARBITRATION, 1.  
BAIL, 5.  
PRISONER, 2.  
REPLEVIN, 1.

1. If the plaintiff subpoena witnesses, and remunerate them accordingly, who have been previously subpoenaed by, and received their expenses from the defendant, which circumstances they conceal from the plaintiff; the court will allow the latter the expenses he has paid those witnesses for their attendance, although they were not called for him at the trial, on the ground that such payment was obtained by fraud. *Beason v. Schneider*. H. 57 G. 3. Page 76
2. The plaintiff had holden the defendant to bail, and a verdict was taken for him at the trial, subject to an order of reference, for ascertaining the amount of the damages, and the arbitrator awarded a less sum than 15*l*. Upon an application to the court to allow the defendant his costs, pursuant to 43 Geo. 3. c. 46:—*Held*, that in order to entitle the defendant to such costs, he must shew that the arrest was vexatious and malicious. *Silversides v. Bowley*, H. 57 G. 3.



## COVENANT.

3. If a defendant, in his rule for judgment as in case of a nonsuit, omit to apply for his costs for not proceeding to trial pursuant to notice, he cannot, after that rule be discharged, obtain a separate rule for such costs. *Lingham v. Langhorn, E. 57 G. 3. Page 251*
4. If, to a declaration, stating, that the defendant made an assault on the plaintiff, and beat, bruised, wounded, and ill-treated him, the defendant plead the general issue, and a justification as to the assaulting and ill-treating only, by a plea of *molliter manus imposit*:—*Held*, that such latter plea admitted a battery, and that the plaintiff was entitled to full costs, although he had obtained a verdict for 1s. damages only, and the judge had not certified at the trial. *Johnson v. Northwood, T. 57 G. 3.*

420

## CO-SURETY.

*See* REPLEVIN, 1.

1. A surety in an indemnity bond, may bring an action for contribution against his co-surety, although he had given a subsequent security to the obligees, under which he paid the sum conditioned in the bond, without the knowledge or consent of such co-surety. *Dunn v. See, H. 57 G. 3.*

2

## COVENANT.

*See* CHARTER-PARTY, 1, 2.  
PLEADING, 8. 13, 14.  
VARIANCE, 1.

1. A lessee, by executing a lease, is estopped from disputing the title of either of the lessors: Therefore, in an action of covenant for not

## DEBTOR & CREDITOR. 589

repairing, against the assignee of the original lessee, where such assignee was bound to the performance of the same covenants as those contained in the original lease:—*Held*, that a declaration which stated that the plaintiffs derived their title from two lessors only, and that two other lessors, who were also parties to the demise, had no interest therein, was supported by the production of the lease, which appeared to be a demise by the four. *Wood and another v. Day, T. 57 G. 3. Page 389*

2. If a lessee covenant to leave premises in repair at the expiration of the term, and also that the lessors might direct the lessee to complete the repairs, by giving six months notice in writing:—*Held*, that these are two distinct and separate covenants, the former of which is not qualified by the latter. *Wood and another v. Day, T. 57 G. 3.*

389

## COUNTY PALATINE.

*See* VENUE, 2.

## CROWN, GRANT OF.

*See* REVERSION.

## CUSTOM-HOUSE CLEARANCE.

*See* INSURANCE, 3, 4.

## DEATH.

*See* ARBITRATION, 8.

## DEBT.

*See* PLEADING, 8.

## DEBTOR AND CREDITOR.

*See* BAIL, 3.

## DECLARATION.

See COSTS, 4.

PLEADING, *passim*.

PRACTICE, 15, 16, 18.

## DEED.

See ATTORNEY, 1.

BOND, 3.

EXECUTION, 2.

LIEN, 2.

1. A reservation in a deed of hawking and hunting does not extend to shooting. *Moore v. the Earl of Plymouth*, T. 57 G. 3. Page 346  
*Quere*, whether a reservation of this description, either as a grant or personal easement, can be entailed on a man and the heirs of his body? *Moore v. the Earl of Plymouth*, T. 57 G. 3. 346
2. An obligation by deed cannot be altered but by deed. *Thomson v. Brown*, T. 57 G. 3. 358

## DEFEASANCE.

See WARRANT OF ATTORNEY, 1.

## DEL CREDERE COMMISSION.

See PLEADING, 9.

SET-OFF, 1.

## DELIVERY.

See FRAUDS, STATUTE OF, 1.

STOPPAGE IN TRANSITU, 1.

## DEMAND OF PLEA.

See PRACTICE, 15.

## DEMURRER.

See PLEADING, 10.

## DEPOSIT.

See INTEREST, 1, 2.

PLEADING, 18.

## DEVISE.

1. A. being seised in fee of divers estates, devises (*inter alia*) to his wife for life, a farm, called *Colt's-foot Farm*, then on lease to M. F., and also two pieces of woodland, called *Bull's Wood*, and *Howe's Wood*, then in his own possession, situate in or near the parish of D. After her death, he gives the woodlands to his eldest son, and all his farms, thereinbefore described, to his third and fourth sons in fee:—*Held*, that a close, called *William Spring*, adjoining *Bull's Wood*, planted by the testator, and excepted in two leases, under which *Colt's-foot Farm* was held, the one granted to M. F. previous, and the other to W. P. subsequent to the execution of the will, passed as part of *Colt's-foot Farm*, subject to the exception in the former lease. *Down and another v. Down*, H. 57 G. 3. Page 80
2. A devise of lands for the establishment of a school to "The right worshipful the mayor, jurats, and town council of *Rye*," was held sufficient to pass such lands to "The mayor, jurats, and commonalty of *Rye*," as it appeared to be the testator's intention to devise to that corporation. *The Attorney-General, at the relation of Clark and another, informants, v. the Mayor, Jurats, and Commonalty of the ancient town of Rye, and others*, T. 57 G. 3. 267
3. If a testatrix devise all her freehold and copyhold estates, situate in or near *Latchingdon*, near *Maldon*:—*Held*, that such devise is not sufficient to pass a field, situate between four and six miles from *Latchingdon*, and within the town of *Maldon*. *Doe, on the demise of Isabella Bell; v. Hannah Pigott*, T. 57 G. 3. 274

## ERROR.

### DISHONOUR, NOTICE OF.

See **BILLS OF EXCHANGE**, 6.

### DISSOLUTION OF PARTNERSHIP.

See **INFANT**, 2.

### DOGS.

See **GAME**.

### DOG-SPEARS.

See **GAME**.

### DURHAM.

See **AMENDMENT**, 1.

### EASEMENT.

See **DEED**, 1.

### EJECTMENT.

See **BAIL**, 3.

1. A notice at the bottom of a declaration in ejectment affixed to the door of an empty house, addressed to the personal representatives of the deceased tenant, generally, was held insufficient: as if there had been representatives who had taken possession, they should have been addressed by name; if not, the lessor of the plaintiffs should have proceeded as in the case of a vacant possession. *Doe, on the demise of the governors of the hospital of Saint Margaret, Westminster, v. Roe.* E. 57 G. 3. Page 113

### EMBARGO.

See **INSURANCE**, 2.

## ERROR.

See **BAIL**, 3.

See **PRACTICE**, 2.

See **VENUE**, 2.

1. The court set aside an execution issued pending a writ of error, sued out before final judgment signed, when the defendant had six

## EVIDENCE.

591

months previously declared that if the plaintiff did not accept the terms then proposed, he should never have any thing, and that he, the defendant, would ultimately bring a writ of error. *Redford v. Garrod*, E. 57 G. 3.

Page 253

### ESSOIGN DAY.

See **PRACTICE**, 15.

### ESTATE.

See **INTEREST**, 2.

See **REVERSION**, 1.

### ESTOPPEL.

See **LEASE**, 1.

### EVIDENCE.

See **BILLS OF EXCHANGE**, 1. 3.

See **INSURANCE**, 6.

See **LEASE**, 1.

See **PAYMENT OF MONEY INTO COURT**, 1.

See **PILOT**, 1.

See **PLEADING**, 7. 9.

See **SHIP**, 1.

See **VARIANCE**.

See **WITNESS**.

1. Parol evidence of a broker may be admitted, to shew that a sale of goods was made to a third person, for whom the buyer acted as agent, although the bought note and invoice were made out in the name of the buyer. *Wilson and others v. Hart*. H. 57 G. 3. 45
2. In an action of *assumpsit*, by an attorney, to recover his charges relative to the grant of an annuity. —Evidence that the defendant said, 'he thought it had been settled when the annuity was granted; but that he had been in so much trouble since, that he could not recollect any thing about it,' is not a sufficient acknowledgment of the debt, to take it out of

the statute of limitations, and is not to be left to the jury, as evidence of the admission of such debt; although the plaintiff proved his bill was not paid at the time of granting the annuity. *Hellings v. Shaw*, T. 57 G. 3. Page 340

3. In an action for a libel contained in a letter: Proof that it was written by the defendant's daughter, who was authorised to make out his bills and write his general letters of business, is not sufficient, unless it can be shewn that such libel was written with the knowledge of or by the procurement of the defendant; neither can the daughter be called as a witness, to prove by whose direction such letter was written. *Harding v. Greening*, M. 58 G. 3. 477.

4. In an action on a promissory note, indorsed by the defendant to the plaintiffs, payable at twelve months after date, a parol agreement entered into between him and the maker when it was drawn, that it was not to be demanded until estates of the maker had been sold, and that the defendant indorsed such note as a surety only, cannot be received in evidence as a waiver of the notice of its dishonour. *Free, and another, v. Hawkins*, M. 58 G. 3. 535

### EXCEPTION.

See DEVISE, 1.

### EXECUTION.

See BAIL, 3. 5.

PRACTICE, 2. 8.

PRISONER, 2.

1. Where a sheriff, by virtue of a *feri facias*, took in execution goods of a person, who, after the seizing, and before the sale of them, became bankrupt, and the assignees gave the sheriff due no-

tice of the bankruptcy, and at the same time required him not to sell:—*Held*, that the sheriff, having applied to the plaintiff in the action for an indemnity for proceeding to sale, as well as to the assignees, for returning *nulla bona*, was, on refusal of such indemnity by both parties, justified in selling the goods, and the court interfered to protect him. *King and another, assignees of Maine, a bankrupt, v. Bridges, and another, sheriff of Middlesex*, H. 57 G. 3. Page 43

2. The property and goods of A. being in possession of the sheriff, under a writ of *feri facias*, he executed a deed of assignment to B. for a valuable consideration, on which the execution was withdrawn. B. superintended the management of the property, but allowed A. to continue in possession. The same property was seized under a subsequent execution at the suit of C:—*Held*, that such property was protected by the assignment to B., although A. had continued in the visible possession. *Jezeeph v. Ingram, sheriff of Sussex*, E. 57 G. 3. 189

### EXECUTOR.

1. In an action against an executor, on an account stated of monies due from him *as such*, he is personally liable; but if an account be stated with him, as executor, of money due from the testator, he is liable in his representative character only. *Powell v. Graham, executor, &c.* T. 57 G. 3. 305

### EXONERATUR.

See BAIL, 5.

### EXPORT.

See EXPORTATION.

## FIERI FACIAS.

### EXPORTATION.

1. Unless a vessel receive her clearing note, and other necessary documents from the proper officer at *Gravesend*, it is not such an exportation of the goods, as will protect the cargo, although she left the port of *London*, and observed the usual formalities of clearing at the custom-house there. A license, therefore, for exportation to an hostile port remaining in force till the 10th of *September*, was not complied with by clearing from the custom-house, on the 9th, and receiving a cocket at *Gravesend*, on the 12th of *September*, although the vessel met with an accident:—and the insurance was in consequence held void. *Williams v. Marshall*, E. 57 G. 3. Page 168
2. So, a vessel was held not to be protected under a license for six months, which was to be renewed on application by the parties, on the return of the vessel from her voyage; it appearing that the license expired on the 2d of *January*, and that the ship cleared at the custom-house on the 19th of *December* preceding, but did not receive her clearance at *Gravesend* till the 20th of *January*, being detained by the exporter, who feared a capture by *French* privateers. *Tulloch v. Boyd*, E. 57 G. 3. 174

### FEME COVERT.

See *BARON AND FEME*.

### FENCES.

See *GAME*.

## FIERI FACIAS.

See *EXECUTION*, 1, 2.

VOL. I.

## FRAUDS, STATUTE OF. 593

### FILACER.

See *AMENDMENT*, 1.

### FINE.

1. If the clerk of an attorney, employed to levy a fine, abscond, whereby the papers are mislaid, the court will permit such fine to be afterwards perfected, although the time allowed by rule of court of T. T. 52 Gro. 3. be exceeded. *Moule, plaintiff, Eyles and wife deforciant*s. E. 57 G. 3. Page 125
2. Fine amended by altering the surname of one of the deforciant's in the præcipe and concord, conformably to his signature in the covenant and dedimus. *Bye, plaintiff, Haywood, and others, deforciant*s. E. 57 G. 3. 125
3. A fine may be amended by substituting one county for another, if it appear that the lands, intended to pass, are situate in the same parish which runs into both counties. *Stubbs, plaintiff, Stephenson, deforciant*. M. 58 G. 3. 590

### FORMER RECOVERY.

See *PLEADING*, 1.

## FRAUDS, STATUTE OF.

See *EVIDENCE*, 1.

1. The defendant, on the purchase of a horse, offered the plaintiff's servant a shilling to bind the bargain, which was returned:—*Held*, that this was not a sufficient compliance with the stat. 29 Car. 2. c. 3. s. 17. *Blenkinsop v. Clayton*, T. 57 G. 3. 328
2. If a person bargain with the servant of a vendor for the purchase of a horse, and desire such servant to deliver him at his stables at a certain time, and before

q c

its expiration shew the horse to a third person, who refuses to purchase:—*Quere*, Whether this will amount to a delivery within the statute? At all events, it is a question for the jury to determine. *Blenkinsop v. Clayton*, T. 57 G. 3.

Page 328

#### FRAUDULENT CONVEY- ANCE.

1. The property and goods of *A.* being in possession of the sheriff under a writ of *feri facias*, he executed a deed of assignment to *B.* for a valuable consideration, on which the execution was withdrawn: *B.* superintended the management of the property, but allowed *A.* to continue in possession: The same property was seized under a subsequent execution at the suit of *C.*—*Held*, that such property was protected by the assignment to *B.*, although *A.* had continued in the visible possession. *Joseph v. Ingram, sheriff of Sussex*, E. 57 G. 3.

189

#### FREIGHT.

See CHARTER-PARTY, 1, 2.  
SHIP, 1.

1. A vessel freighted by the defendants from *Dantzic* to *London* was, on her arrival, and after part of the cargo had been delivered at the latter place, seized by the revenue officers, on suspicion that she was not *Prussian* built. The treasury, on petition, ordered the ship to be restored, on condition that the cargo should be exported, and on payment of 50*l.* as a satisfaction to the seizing officers:—*Held*, that this was sufficient to shew that the voyage was illegal without condemnation, and that although the freighters afterwards accepted and exported the cargo, according to the terms of the

order, the master of the ship having paid the sum demanded as a satisfaction to the seizing officers, admitted the illegality of the voyage, so as to preclude him from recovering freight. *Blackett v. Solly, and another*, M. 58 G. 3.

Page 531

#### GAME.

See DEED, 1.  
GRANT, 1.

1. The defendant, being the owner and occupier of certain woodlands adjoining and divided from another woodland of *J. T.* by an insufficient fence to prevent dogs from passing from one woodland to the other, through which woodland of the defendant there were several public footpaths not fenced off, the defendant, for the preservation of hares in his woodland, and to destroy dogs and foxes which might come in pursuit of them, fixed iron spikes, called dog-spears, sharp at each end, into several trees, under which a hare might pass without injury, but a dog in pursuing such hare would be liable either to be wounded or killed. None of these spikes were at a less distance than fifty yards from any of the footpaths, with each end pointing along a hare-track; on the outside of the defendant's woodland were placed painted notices, "that steel-traps, spring-guns, and dog-spikes, and also spring-traps for vermin, were set therein." The plaintiff was sporting, by permission, in the woodland of *J. T.* with a pointer dog, where a hare was started and pursued by his dog into the woodland of the defendant. Although the plaintiff used every means in his power to prevent such pursuit, the dog entered

the woodland of the defendant, ran against one of the spikes, and was killed.—The plaintiff having brought an action on the case against the defendant to recover damages for the loss of his dog, the court were equally divided in opinion, whether the defendant were authorized in fixing the dog-spears, or whether he were answerable to the plaintiff for damages for the loss of his dog. *Deane v. Sir William Clayton, bart.* *E. 57 G. 3.* Page 203

2. A game-keeper is not empowered to seize game, in the possession of an unqualified person, under a general direction given him by the lord of a manor, although such seizure were made within the manor. *Bird v. Dale, T. 57 G. 3.*

290

## GAMEKEEPER.

See GAME, 2.

## GOODS SOLD AND DELIVERED.

See BILLS OF EXCHANGE, 1.  
PLEADING, 9.  
WITNESS, 2.

## GRANT.

See REVERSION, 1.

1. A reservation in a deed of hawking and hunting does not extend to shooting. *Moore v. the Earl of Plymouth, T. 57 G. 3.* 346  
*Quare*, Whether a reservation of this description, either as a grant or personal easement, can be entailed to a man and the heirs of his body? *Ibid.*

## GUARANTIE.

See PLEADING, 9.  
SET-OFF, 1.

## GUARDIAN.

See INFANT, 1.

## HARES.

See GAME.

## HORSE.

See FRAUDS, STATUTE OF, 1.

## ILLEGAL VOYAGE.

See FREIGHT, 1.

## IMPARLANCE.

See PRACTICE, 15.

## INDEMNITY.

See EXECUTION, 1.

## INDEMNITY BOND.

See BOND, 1.

## INDICTMENT.

See ARBITRATION, 1.

## INDORSEMENT.

See BILLS OF EXCHANGE.

## INFANT.

1. If a defendant be sued as administratrix during her minority, and appear by attorney, such appearance is irregular, as she should have appeared by guardian. *Hindmarsh v. Chandler, E. 57 G. 3.* Page 250
2. If an infant enter into partnership with an adult, and take a lease of premises from another person for carrying on a business, for which he pays a premium of three hundred guineas, one half in cash, and accepts bills of exchange, drawn by the defendant for the remainder in the name of the partnership, which partnership he dissolves on his becoming of age:—*Held*, that the defendant, four months after such dissolution, having sued the adult partner alone, on one of the bills, and accepted a surrender of the lease from him, it should have been left

q q 2

to the jury to determine whether this arrangement avoided the plaintiff's contract, it having been made without his privity, and the court granted a new trial. *Holmes v. Blogg*, M. 58 G. 3. Page 466  
*Quere*, Whether four months after an infant becomes of age, be a reasonable time for him to avoid a lease entered into during his minority? *Ibid*.

### INSOLVENT DEBTOR.

See PRISONER.

### INSPECTION AND PRODUCTION OF PAPERS.

1. If one part of an indenture of apprenticeship be executed by the plaintiff and defendant, and sworn to be in the possession of the latter: — *Held*, on a notice given by the plaintiff to produce it, that an affidavit of the defendant, stating that he had no such indenture in his possession, and that he had not destroyed it, and that he did not know in whose possession it was, or what had become of it, was insufficient, for that he should have stated that it never existed, that he had never possessed it, or that he had not been enabled to find it. *Cooke v. Tanswell*, M. 58 G. 3. 465

### INSTALMENT.

See WARRANT OF ATTORNEY, 1.

### INSURANCE.

See AGENT, 2.

PAYMENT OF MONEY INTO COURT, 1.

PRACTICE, 2.

SET-OFF, 1.

1. A policy of insurance was effected on goods from *Batavia* to *London*. After the execution of the policy,

the time of sailing was enlarged, from the 10th of *October*, to the 21st of *December*, by the assureds, and acquiesced in by all the underwriters, except the defendant: — *Held*, that it was a material alteration, although the defendant had signed three memoranda subsequent thereto; yet, not having assented to it, the policy was void as to him; and that, consequently, the assureds could not recover the amount of his subscription. *Fairlie, and others, v. Christie*, E. 57 G. 3. Page 114

2. A policy was effected on a ship from *London* to her landing port in *Virginia*, and back. On her arrival at that port, in *January*, 1808, an embargo was laid on all shipping in *American* ports, by an act of Congress, which contained a proviso, that all foreign ships, either in ballast, or with goods on board, might depart when notified of that act. The captain had warranted by charter-party to take in a cargo of timber at that port, and return therewith to *London*. It was proved that this embargo was taken off in *March*, 1809, and that the ship did not sail until the *August* following; and that she was lost on her voyage home: — *Held*, that the captain was justified in remaining in port, and that he was not bound to return with her cargo, or sail in ballast, and that consequently the underwriters on the ship were liable at the time of the loss. *Schroder, and another, v. Thompson*, E. 57 G. 3. 163
3. Unless a vessel receive her clearing note, and other necessary documents from the proper office at *Gravesend*, it is not such an exportation of the goods, as will protect the cargo, although she



## INSURANCE.

left the port of *London*, and observed the usual formalities of clearing at the custom-house there. A licence, therefore, for exportation to an hostile port remaining in force, till the 10th of *September*, was not complied with by clearing from the custom-house, on the 9th, and receiving a cocket at *Gravesend*, on the 12th of *September*, although the vessel met with an accident;—and the insurance was in consequence held void. *Williams v. Marshall*, *E. 57 G. 3.*

Page 168

4. So, a vessel was held not to be protected under a licence for six months; which was to be renewed on application by the parties, on the return of the vessel from her voyage; it appearing that the licence expired on the 2d of *January*, and that the ship cleared at the custom-house on the 19th of *December* preceding; but did not receive her clearance at *Gravesend* till the 20th of *January*, being detained by the exporter, who feared a capture by *French* privateers. *Tallock v. Boyd*, *E. 57 G. 3.*

174

5. If the owner of a vessel, fully laden by the freighters, collude with the captain to run her on shore;—*Held*, that this amounts to barratry, although by the terms of a charter-party entered into between such owner and the freighters, the former was entitled to put goods on board during a previous part of the voyage. *Swares and another v. Thornton*, *T. 57 G. 3.*

873

6. The defendant, with several other underwriters, in *August*, 1814, subscribed a policy on hides from *Buenos Ayres* to *London*. The ship was captured, and the plaintiffs abandoned the cargo to the underwriters, and claimed a total

## INTEREST OF MONEY. 597

loss. Some time after, the ship was re-captured, and all the underwriters, but the defendant, on the 19th of *October*, 1814, adjusted a salvage loss, deducting short interest, to the amount of 64*l.* 18*s.* 3*d.* per cent., which they paid. The defendant, on the 7th of *February*, 1815, adjusted 33*l.* per cent. on account of his subscription to the policy, until the account of the goods insured could be made up, when a final loss was to be paid to the same amount as by the other underwriters, and if the same exceeded 33*l.* per cent. the defendant was to pay the excess, if short, the insured to return the difference:—*Held*, in an action to recover such loss, that this was a conditional, and not an absolute adjustment, and as the plaintiffs had not proved that the account of the goods insured had been made up, they were not entitled to recover; and that the defendant was not bound by the former adjustment of the other underwriters.

7. The declaration contained two counts on the policy, averring a total loss by capture. It seems that the plaintiffs should have declared specially on the defendant's adjustment. *Gannon and another v. Beverley*, *M. 58 G. 3. Page 563.*

## INSURANCE BROKER.

See *SAVOY*, *1814*.

## INTEREST IN LAND.

See *REVERSION*, *1814*.

## INTEREST OF MONEY.

1. If a purchaser pay a deposit to auctioneers at the time of sale, in part of his purchase money, and bring an action against them to recover it back, in consequence of the vendor's not being able to make a good title, and such de-

posit be recovered from them,—the purchaser is entitled to interest on the deposit from the time the purchase should have been completed, and may recover it from the vendor on alleging the special damage in his declaration. *Farquhar v. Farley*, T. 57 G. 3.

Page 322

2. Where the purchaser of an estate, by public auction, deposits a sum with the auctioneer, as part of the purchase money, until the vendor make out a good title, according to the conditions of sale:—*Held*, in an action to recover such deposit from the auctioneer, that he is not liable for interest, although nearly four years may have elapsed from the time of the sale:—on the ground that no demand had been made on him for the repayment of the deposit. *Lee and another v. Munn*, M. 58 G. 3. 481

#### INVOICE.

*See* BANKRUPT, 6.

#### JOINDER OF COUNTS.

*See* PLEADING, 10.

#### IRREGULARITY.

*See* PRACTICE, 9. 15, 16.

#### IRISH PEER.

*See* PEER, 1.

#### ISSUABLE PLEAS.

*See* PLEADING, 16.

#### ISSUE.

*See* BOND, 2.

#### JUDGES CERTIFICATE.

*See* COSTS, 4.

#### JUDGES ORDER.

*See* PRACTICE, 10. 13.

#### JUDGMENT.

*See* PRACTICE, 10. 13.

WARRANT OF ATTORNEY, 1, 2.

#### JUDGMENT OF NONSUIT.

*See* PRACTICE, 7.

#### JUDGMENT RECOVERED.

*See* PLEADING, 1.

#### JUROR.

*See* AFFIDAVIT.

#### JUSTIFICATION.

*See* COSTS, 4.

#### JUSTIFICATION OF BAIL.

*See* BAIL, 1. 6.

#### LANDLORD AND TENANT.

*See* DEVISE, 1.

EJECTMENT, 1.

LEASE.

PLEADING, 8.

WASTE, 1.

#### LEASE.

*See* BOND, 8.

INFANT, 2.

LIEU, 1.

PLEADING, 18.

VARIANCE, 1.

1. A lessee, by executing a lease, is estopped from disputing the title of either of the lessors:—Therefore, in an action of covenant for not repairing, against the assignee of the original lessee, where such assignee was bound to the performance of the same covenants as those contained in the original lease:—*Held*, that a declaration which stated that the plaintiffs derived their title from two lessors only, and that two other lessors who were also parties to the demise had no interest therein, was supported by the production of the lease, which appeared to be a demise by the four. *Wood, and another, v. Day*, T. 57 G. 3. Page 389
2. If a lessee covenant to leave premises in repair at the expiration of the term, and also that the lessor

## LIEN.

might direct the lessee to complete the repair, by giving six months notice in writing:—*Held*, that these are two distinct and separate covenants, the former of which is not qualified by the latter. *Wood, and another, v. Day, T. 57 G. 3. Page 389.*

## LETTER.

See LIBEL.

## LIBEL.

See APOTHECARY, 1.

1. In an action for a libel, contained in a letter: Proof that it was written by the defendant's daughter, who was authorised to make out his bills and write his general letters of business, is not sufficient, unless it can be shewn that such libel was written with the knowledge of or by the procurement of the defendant; neither can the daughter be called as a witness, to prove by whose direction the letter was written. *Harding v. Greening, M. 58 G. 3. 477*

## LICENCE.

See BOND, 3.

See READING, 17.

## LICENCE TO EXPORT.

See EXPORTATION.

## LIEN.

1. If a customer deposit a lease with his bankers, without stating for what purpose it is left, and afterwards becomes bankrupt:—*Held*, that the bankers have not a lien on it, in order to secure the payment of their general balance; and that the assignees may maintain an action of trover for its recovery. *Lucas and others, assignees of Doorman, a bankrupt, v.*

## LIMITATION OF ESTATE. 599

*Dorrien and others, II. 57 G. 3. Page 29*

2. Where deeds are delivered to an attorney, by A. and B. jointly, for the purpose of carrying on a suit in the Exchequer. This court, upon motion by A. alone, will not order such deeds to be delivered up, on payment of the debt and costs by him, as they could not bring B. before them, nor bind his rights in his absence. *Duncan, gent. one, &c. v. Richmond, E. 57 G. 3. 99*

## LIMITATION OF ACTIONS.

1. In an action of *assumpsit*, by an attorney, to recover his charges relative to the grant of an annuity.—Evidence that the defendant said, 'he thought it had been settled when the annuity was granted; but that he had been in so much trouble since, that he could not recollect any thing about it,' is not a sufficient acknowledgment of the debt, to take it out of the statute of limitations, and is not to be left to the jury, as evidence of the admission of such debt; although the plaintiff proved that his bill was not paid at the time of granting the annuity. *Hellings v. Shaw, T. 57 G. 3. 340.*

## LIMITATION OF ESTATE.

1. An estate, granted by the crown to a subject as tenant in tail for services, is not barred, so as to destroy the reversion of the crown; although two private acts of parliament may have been passed, confirming a settlement by the tenant in tail, purporting to pass such reversion, the crown being a party to neither of such acts, and each of them containing a saving clause, by which its rights were expressly reserved. *Mitford v. Elliott, M. 58 G. 3. 434*

2. If a private act of parliament confirm a settlement of such estates made by the tenant in tail, and a subsequent act vest part of these estates in trustees for sale, with directions to purchase other lands with the produce of such sale, to be settled in lieu thereof, to the same uses as expressed in the preceding act:—*Held*, that the trustees had no power to convey the estates, so granted by the crown to a purchaser and his heirs in fee simple, and that the substitution of other lands did not destroy the reversionary interest of the crown in the estates originally granted. *Mitford v. Elliot*, M. 58 G. 3. Page 434

## LONDON—CUSTOM OF.

*See* BROKER, 1.

## LORD OF MANOR.

*See* GAME, 2.

## LORDS' ACT.

*See* PRISONER, 2.

## MALICIOUS ARREST.

*See* COSTS, 2.

*PRACTICE*, 3.

## MANDAMUS.

*See* ARREST, 1.

## MARRIAGE.

*See* BOND, 2.

## MASTER OF SHIP.

*See* INSURANCE, 2.

*PILOT*, 1.

## MASTER AND SERVANT.

*See* LABEL, 1.

## MEMORANDA.

*See* 1. 98. 482.

## MISDESCRIPTION.

*See* PLEADING, 7.

## MISJOINDER.

*See* PLEADING, 10.

## MISNOMER.

*See* DEVISE, 2.

1. The misnomer of a Christian name of one of the bail in a recognizance and notice, is fatal. *Anonymous*, E. 57 G. 3. Page 126

## MOLLITER MANUS IMPOSIT.

*See* COSTS, 4.

## MONEY HAD AND RECEIVED.

1. Where persons have received money for the express purpose of taking up a bill of exchange, two days after it became due, and upon tendering it to the holders, and demanding the bill, find that they have sent it back protested for non-acceptance to the persons who indorsed it to them:—*Held*, that such persons having received fresh orders not to pay the bill, were not liable to an action by the holders for money had and received, when upon the bills being reproccured and tendered to them, they refused to pay the money. *Stewart and another, v. Fry and another*. H. 57 G. 3. 74
2. If a person employed by ship-owners, as their agent, effect a policy of insurance, and represent himself as the principal to the brokers, who cause such insurance to be effected:—*Held*, that if the brokers receive the amount of the loss from the underwriters and pay it over to the agent, they are not liable to the owners, in an action

## OBLIGATION.

for money had and received, although part of the money was paid to the agent after they were informed of his having acted in that capacity. *Bell and others, v. Jutting and another, E. 57 G. 3.*  
Page 155

## MUTUAL CREDIT.

See BANKRUPT, 5.

## MUTUAL DEBTS.

See SET-OFF, 1.

## MUTUAL TRUST.

See BANKRUPT, 5.

## NAVIGATION ACT.

See FREIGHT, 1.

## NOTICE.

See EJECTMENT, 1.

GAME, 1.

PRACTICE, 7.

## NOTICE OF DECLARATION.

See PRACTICE, 9. 18.

## NOTICE OF DISHONOUR.

See BILLS OF EXCHANGE, 4.

## NOTICE TO PRODUCE DEEDS.

See AFFIDAVIT, 2.

## NOTICE OF TRIAL.

See PRACTICE, 5.

## NUTIEL RECORD.

See PRACTICE, 13.

## OBLIGATION.

See CHARTER-PARTY, 2.

## PAYMENT. 501

## OBLIGEE OF BOND.

See AFFIDAVIT TO HOLD TO BAIL, 1.  
BOND, 2.

## OFFICER.

See PRACTICE, 12.

## ORDER OF REFERENCE.

See ARBITRATION, 4.

## ORDER FOR SUPERSEDEAS.

See SUPERSEDEAS, 1.

## ORIGINAL WRIT.

See VENUE, 2.

## OUTLAWRY.

See ARBITRATION, 2.

## PARISH.

See PLEADING, 7.

## PARTNERSHIP.

See ARBITRATION, 2.

INFANT, 2.

WITNESS, 2.

## PAYMENT OF MONEY INTO COURT.

1. In an action to recover a subscription from an underwriter on a policy of insurance, if the declaration state the vessel to be stranded, bulged, damaged, and wrecked, and money be paid into court generally by the defendant thereon: — *Held*, that such payment could not be applied by the plaintiff, who offered the rule of court as evidence of the loss, as an admission of a stranding only, as such payment might apply to any other

loss. *Everth and another v. Bell*,  
E. 57 G. 3. Page 158

### PEER.

1. If an *Irish* peer be sued by bill, the court will not set aside the proceedings on motion; but leave him to plead his privilege in abatement. *Davies v. Lord Rendlesham*, T. 57 G. 3. 410

### PETITIONING CREDITOR.

See **BANKRUPT**, 4.

### PILOT.

1. By the general Pilot Act (52 G. 3. c. 39. s. 30.) an owner or master of a vessel is in no case answerable for an accident, occasioned to another ship, provided he has a pilot on board.—Nor is it necessary to prove, in an action brought against such owner, that the injury arose from the incompetency of his pilot. *Bennet, and another, v. Moula*, H. 57 G. 3. 4

### PLEADING.

See **CHARTER-PARTY**, 2.

**COSTS**, 4.

**EJECTMENT**, 1.

**INSURANCE**, 6.

**INTEREST**, 1.

**PRACTICE**, 10.

**VARIANCE**.

**WITNESS**, 2.

1. In a plea of former recovery in the *King's Bench*, it is not sufficient to state that a judgment was recovered in the *Court of the Bench*, for these words apply only to the *Court of Common Pleas*, and cannot be construed to extend to the *Court of King's Bench*. *Mill v. Pollon*, H. 57 G. 3. 19
2. In an action of *assumpsit* for not delivering bonds and other se-

curities, pursuant to an agreement, where the consideration money was to be paid on the receipt of the securities; it is not necessary to aver an actual tender of the money, an allegation of the plaintiff's being ready and willing to pay is sufficient. *Levy v. Lord Herbert*, H. 57 G. 3. Page 56

3. The plaintiff in declaring on a warranty of seed, averred, that the defendant undertook that it was good, and which he could warrant:—*Held*, a sufficient averment to express an absolute and special warranty. *Bulton v. Cordeur*, E. 57 G. 3. 109
4. A declaration in *assumpsit* against husband and wife, on the common money counts, one of which alleged that the husband was indebted for money lent to the wife, at her request, was held bad on writ of error, and the judgment given for the plaintiff below was reversed. *Stone v. Macnair*, E. 57 G. 3. 126
5. If on a writ of error, one of several counts, in a declaration of *assumpsit*, be bad, and the defendant below suffer judgment by default, and the verdict be entered generally on the whole declaration, such judgment must be reversed. *Stone v. Macnair*, E. 57 G. 3. 126
6. In a bailable *capias* against two defendants, with a clause of *etiam* against one, the plaintiff may declare against that one solely, though both have been arrested under the writ; for the *et etiam* points out the person intended to be proceeded against. *Kerral v. William Fosset and Thomas Fosset*, E. 57 G. 3. 147
7. In a declaration of trespass for breaking and entering a house, the premises were laid in the parish of *Clerkenwell*: It was proved that

*Clerkenwell* consisted of two parishes or districts, though it was generally known by the name of *Saint James, Clerkenwell*:—*Held*, an insufficient description. *Taylor v. Hooman, E. 57 G. 3. Page 161*

8. An action of debt was commenced against the defendant for the non-payment of rent, and discontinued: An action of covenant was then brought for the same rent, which the defendant tendered previously to its commencement:—*Held*, that such tender was well pleaded. *Johnston v. Clay, E. 57 G. 3. 200*

9. If a declaration state the defendant to be indebted to the plaintiff, in respect of goods delivered by him to the defendant, to be sold and disposed of; and it appeared in evidence, that the defendant received a *del credere* commission on guaranteeing the solvency of the purchasers:—*Held*, that such declaration was insufficient, as the commission was not therein stated. *Gall v. Comber, T. 57 G. 3. 279*

10. In an action against an executor, on an account stated of monies due from him *as such*, he is personally liable; but if an account be stated with him, as executor, of money due from the testator, he is liable in his representative character only:—Therefore, a declaration containing nine counts, the first five of which stated promises to be made by a testator; the sixth and seventh, promises by a testator, that his executor should pay, and that the defendant, as executor, became liable; the eighth, a promise by a testator, that his executor should, in a reasonable time after his decease, as such executor, pay the plaintiff a certain sum, who averred that the defendant had notice thereof after the testator's death, by reason

whereof, and of the reasonable time being elapsed, he became liable; and the ninth, an account stated between the plaintiff and defendant as executor, after the death of the testator, of money due from him as executor to the plaintiff; to which declaration the defendant demurred generally, on the ground of misjoinder.—*Held, First*, That there was no misjoinder, as neither of the counts made the defendant personally liable, since the money, if recovered, would be assets in his hands; and, that the plea of *plene administravit*, and the judgment *de bonis testatoris*, would apply to all. *Secondly*, if the defendant demur generally, to all the counts in a declaration, judgment must be entered for the plaintiff on such of them as are good. *Powell v. Graham, executor, &c. T. 57 G. 3. Page 305*

11. *Semble*, If a testator promise that his executor shall pay a certain sum of money, after his decease, the plaintiff need not aver in his declaration that the defendant had assets, or that he promised as executor to pay. *Ibid.*
12. In a declaration in replevin for taking goods, the description, number, and value of them must be stated with certainty. *Pope v. Tilman, and another, T. 57 G. 3. 386*

13. A lessee, by executing a lease, is estopped from disputing the title of either of the lessors:—Therefore, in an action of covenant for not repairing, against the assignee of the original lessee, where such assignee was bound to the performance of the same covenants as those contained in the original lease:—*Held*, that a declaration, which stated that the plaintiff derived their title from two lessors only, and that two other lessors

who were also parties to the demise had no interest therein, was supported by the production of the lease, which appeared to be a demise by the four. *Wood, and another, v. Day, T. 57 G. 3. Page 389*

14. If a lessee covenant to leave premises in repair at the expiration of the term, and also that the lessors might direct the lessee to complete the repair, by giving six months notice in writing:—*Held*, that these are two distinct and separate covenants, the former of which is not qualified by the latter. *Wood, and another, v. Day, T. 57 G. 3. 389*

15. In an action of trespass by husband and wife, in which they declared that the defendant drove a chaise against another chaise, in which the wife was then riding, whereby she was thrown out, and sustained an injury:—On a motion in arrest of judgment, *held*, that the plaintiff's remedy was trespass, and not case, and that it was unnecessary to state in the declaration to whom the plaintiff's chaise belonged, at the time the accident happened. *Hopper and wife, v. Reeve, T. 57 G. 3. 407*

16. If a defendant, in an action on a recognizance of bail, under a judge's order to plead issuably, plead, *first, nul tiel record*, and *secondly*, that no *ca. sa.* was sued out against the principal:—*Held*, that such pleas might be considered as issuable, and that the plaintiff could not sign judgment as for want of a plea. *Hartley v. Hodson, T. 57 G. 3. 430*

17. If, to debt on bond which contained a condition, that the defendant should not open a shop within a certain distance of premises demised in a lease, and the defendant plead that he opened a shop by the licence of the plaintiff:

—*Held*, that such plea was bad, on general demurrer, on the ground that a licence, after breach, was not good, unless by deed. *Sellers v. Bickford, M. 58 G. 3. Page 460*

18. The defendant became the purchaser of a leasehold estate, sold by public auction.—By the conditions of sale it was stipulated that the purchaser should immediately pay down a deposit, in part of the purchase money, and sign an agreement for payment of the remainder, within twenty-eight days from the day of sale, when possession should be given of the part in hand, and that the purchaser should have proper conveyances and assignments of the leases, without requiring the lessor's title on payment of the remainder of the purchase money. In an action of *assumpsit*, brought by the seller, for the non-performance of the conditions on the part of the purchaser, the declaration stated in the *first* count, that the plaintiffs gave the defendant possession, according to the conditions, and were also ready and willing to give him proper conveyances and assignments of the leases of the estate, on payment of the remainder of the purchase money; and the *second* count stated, that the plaintiffs contracted with the defendant to sell, and the defendant to purchase an estate, and that on the plaintiffs having promised the defendant to convey; he promised to accept the conveyance and pay the remainder of the purchase money in a reasonable time: That although the plaintiffs were ready and willing, and offered to convey and assign to the defendant, and although a reasonable time had elapsed for accepting the conveyance, yet that the defendant would not accept it, or pay the re-



majority of the purchase money.—  
On a motion in arrest of judgment,  
on the grounds that the plaintiffs  
had not set out their title, or ten-  
dered the conveyances to the de-  
fendant:—*Held*, that the plaintiffs  
were not bound to set out their  
title, and that the allegation of  
their being ready and willing to  
convey, were equivalent to a per-  
formance of the conditions on their  
parts; but that, at all events, such  
objections could not be supported  
after verdict. *Ferry, and another,*  
*v. Williams*, M. 58 G. 3. Page 498

#### PLENE ADMINISTRAVIT.

See PLEADING, 10.

#### POLICY OF INSURANCE.

See AGENT, 2.

#### INSURANCE.

#### PRACTICE.

See AFFIDAVIT.

AFFIDAVIT TO HOLD TO BAIL.

AMENDMENT.

ARBITRATION.

ARREST.

ATTORNEY.

BAIL.

COSTS.

EXECUTION.

INSPECTION AND PRODUCTION  
OF PAPERS.

JUROR.

MISNOMER.

PAYMENT OF MONEY INTO  
COURT.

PRISONER.

REPLEVIN.

SHERIFF.

SUPERSEDEAS.

VARIANCE.

VENUE.

WARRANT OF ATTORNEY.

WITNESS.

1. Where the defendant's attorney,  
not having received instructions as  
to the nature of the defence to an

action, pleads a sham plea, and  
afterwards swears to merits, the  
court will allow such plea to be  
withdrawn on terms. *Free, and*  
*others, v. Hawkins*, H. 57 G. 3.

Page 28

2. The defendant, having entered into  
a consolidation rule, and the plain-  
tiff obtained a verdict on the cause  
tried, which was afterwards turned  
into a special verdict, to enable  
the defendant to remove it by a  
writ of error to the *King's Bench*,  
which was done, and bail put in  
accordingly.—This court will stay  
execution in the action against  
the defendant, till the determina-  
tion of the writ of error be known,  
on his giving security to be bound  
by the judgment of the *King's*  
*Bench*. *Gill, and another, v. Hinck-*  
*ley*, H. 57 G. 3. Page 79
3. If a defendant be holden to bail  
on an affidavit for £17, out of  
which £6 : 10s : 0d have been  
paid, the court will not set aside  
the proceedings, under the 54 G.  
3. c. 124. s. 1.; but his remedy, if  
any, would be under the 43 G. 3.  
c. 46. for having been maliciously  
holden to bail. *Spink v. Hitch-*  
*cock*, E. 57 G. 3. Page 131
4. In a bailable *capias* against two  
defendants, with a clause of *ac-*  
*tum* against one, the plaintiff may  
declare against that one solely,  
though both have been arrested  
under the writ; for the *ac-tum*  
points out the person intended to  
be proceeded against. *Mervat v.*  
*William Fossett and Thomas Fossett*,  
E. 57 G. 3. Page 147
5. If a defendant undertake to ac-  
cept short notice of trial for the  
sittings after term, such notice  
cannot be considered to extend to  
the adjourned sittings. *Abbott v.*  
*Abbott*, E. 57 G. 3. Page 160
6. If a defendant be sued as admini-  
stratrix during her minority, and

appear by attorney, such appearance is irregular; as she should have appeared by guardian. *Hindmarsh v. Chandler*, E. 57 G. 3.

Page 250

7. If a defendant in his rule for judgment as in case of a nonsuit, omit to apply for his costs for not proceeding to trial pursuant to notice, he cannot, after that rule be discharged, obtain a separate rule for such costs. *Lingham v. Langhorn*, E. 57 G. 3.

251

8. The court set aside an execution issued pending a writ of error, sued out before final judgment signed, when the defendant had six months previously declared that if the plaintiff did not accept the terms then proposed, he should never have any thing and that he, the defendant, would ultimately bring a writ of error. *Redford v. Garrod*, E. 57 G. 3.

253

9. If a defendant be irregularly served with process, he may apply to set aside the proceedings, although the plaintiff may have entered an appearance for him, and served him with a notice of declaration and given him a rule to plead. *Ledwich, gent., one, &c. v. Prangnell*, T. 57 G. 3.

299

10. If a defendant obtain time to plead, in *Easter* term, under a judge's order, which does not extend to the first day of the following term, the plaintiff may enter up judgment, as of such following term, without having a new rule to plead. *Donne v. Marsh*, T. 57 G. 3.

320

11. If an *Irish* peer be sued by bill, the court will not set aside the proceedings on motion; but leave him to plead his privilege in abatement. *Davies v. Lord Rendlesham*, T. 57 G. 3.

410

12. If a defendant on being arrested by a sheriff's officer, give a *cogno-*

*vit* to the plaintiff, who was the attorney in the cause, without an attorney being present on his part, such *cognovit* is void, although the plaintiff swore that he was unattended by the officer, and that he did not know the defendant was in custody at the time the *cognovit* was given. *Webb and Yates v. Aspinall*, T. 57 G. 3.

Page 428

13. If a defendant, in an action on a recognizance of bail, under a judge's order to plead *issuably*, plead, *First, nul tiel record*, and *Secondly*, that no *ca. sa.* was sued out against the principal:—*Held*, that such pleas might be considered as issuable, and that the plaintiff could not sign judgment as for want of a plea. *Hartley v. Hodson*, T. 57 G. 3.

430

14. The plaintiffs sued out a *ca. sa.* against a principal, who having put in bail, became bankrupt, and obtained his certificate; and afterwards agreed to accept a composition, provided all his creditors would accept the same, of which the bail had no notice:—*Held*, that the *ca. sa.* against the principal should be set aside, and that as the bail had not applied to enter an *exonerateur* on the bail-piece until after execution had been levied on them, they could only be relieved on payment of costs. *Thackrey, and others, v. Turner*, M. 58 G. 3.

457

15. If a declaration be delivered on the *essoign* day of *Hilary* term and an imparlance to *Easter* be given to the defendant, when a rule to plead was given, but no demand of plea made:—*Held*, that the plaintiff having signed judgment in *Trinity* term for want of a plea was irregular, and the court set aside the proceedings. *Harvey v. Goodford*, M. 58 G. 3.

464

## PRINCIPAL AND AGENT.

16. A bailable, and not a *testatum capias*, was issued into *Durham*, and signed by the filacer for that county. The defendant was arrested, and put in bail as upon a *testatum*. A declaration was afterwards delivered, in which the venue was laid in *Lincolnshire*. A recognizance of bail was entered into in *Middlesex*, and a declaration on such recognizance was afterwards delivered, to which the defendant pleaded. On a motion to amend the entry of the recognizance from *London* to *Durham*:—*Held*, that the defendant having submitted to the arrest, and put in and got bail allowed, as upon a *testatum capias*, had waived the irregularity, and the court refused to interfere, but left the party to his ordinary remedy, and expressed their opinion that such writs ought not to issue in future. *Hartley v. Hodson*, M. 58 G. 3. Page 514
17. The court permitted a person to justify as bail, although he did not reside in the house in which he was described in the notice. *Hemming v. Plenty*, M. 58 G. 3. 529
18. Notice of a declaration having been filed *de bene esse*, may be given on the return day of the writ, at the time of serving it; but notice cannot be given on that day of a declaration having been filed in chief. *Wallbank v. Abbott*, M. 58 G. 3. 573

## PREMIUMS OF INSURANCE.

See SET-OFF, 1.

## PRINCIPAL AND AGENT.

See AGENT.  
SET-OFF, 1.

## PRINCIPAL AND BROKER.

See BROKER, 1.

## PROMISSORY NOTES. 607

## PRINCIPAL AND SURETY.

See BANKRUPT, 2.

## PRISONER.

See REGULA GENERALIS.

1. An order for a *supersedeas* to discharge a defendant out of custody, on perfecting bail, must be filed with the prothonotary on his signing the writ of *supersedeas*. *Lock v. Craddock*, E. 57 G. 3. Page 144
2. A prisoner, in execution, on an attachment for non-payment of costs pursuant to an award, may be brought up at the instance of the prosecutor to deliver in a schedule of his effects under the compulsory clause in the statute of the 32 Geo. 2. c. 28. as that statute may be incorporated with the 33 Geo. 3. c. 5. *Rex v. Curwen, a prisoner*, M. 58 G. 3. 494

## PRIVATE ACT OF PARLIAMENT.

See REVERSION, 1.

## PRIVILEGE.

See ABATEMENT, 1.

## PRIVILEGE FROM ARREST.

See ARREST, 1.

## PROCEEDINGS—SETTING ASIDE AND STAYING.

See PRACTICE, 3. 9. 11. 15.

## PROCESS.

See PRACTICE, 9. 18.

## PROMISSORY NOTES.

See BILLS OF EXCHANGE, 4.

## PROMOTIONS.

*Firth, William, Esq.* called to the degree of Serjeant at Law. *Page 1*  
*Garrow, Sir William*, his Majesty's Attorney-general, called to the degree of Serjeant at Law, and appointed one of the Barons of the Exchequer. 98

*Gifford, Robert, Esq.* appointed his Majesty's Solicitor-general, and knighted. 98

*Richards, Sir Richard*, knight, appointed Lord Chief Baron of the Exchequer, and one of his Majesty's Privy-council, on the decease of the Right Honourable Sir Alexander Thompson, Knight. 98

*Shepherd, Sir Samuel*, his Majesty's ancient Serjeant and Solicitor-general, promoted to the office of Attorney-general. 98

## PROTHONOTARY.

See REGULA GENERALIS.

## PURCHASE.

See PLEADING, 18.

## PURCHASER.

See REVERSION.

VENDOR AND PURCHASER.

## RECAPTURE.

See INSURANCE, 6.

## RECOGNIZANCE OF BAIL.

See AMENDMENT, 1.

BAIL, 3, 4.

PRACTICE, 13.

## RECOVERY.

1. A deed to make a tenant to the præcipe comprised tithes, in two parishes; but an amendment having been improperly introduced into the recovery, which confined its operation to one parish only, the court will allow the words of such amendment to be transposed, so as to give effect to the deed, and

comprise both parishes. *Lancaster, demandant; Wilmot, tenant; Boone, vouchee, H. 57 G. 3. Page 95*

2. The præcipe of the warrant of attorney in a recovery may be amended, as it is not an integral part of the instrument. *James, the younger, demandant; Williams, tenant; James, spinster, vouchee, E. 57 G. 3. 130*
3. The court permitted a recovery to be amended, by substituting the hamlet of *F.* in the parish of *A.* for the parish of *F.* *Willis, demandant; Calvert, tenant; Bartholomew, and wife, vouchers, E. 57 G. 3. 131*

## REFERENCE, ORDER OF.

See ARBITRATION, 2, 3, 4.

## REGULA GENERALIS.

1. Rules and orders for writs of supersedeas to discharge prisoners out of custody must be filed with the prothonotary, on their signature of such writs. *E. 57 G. 3. 156*

## RENT.

See PLEADING, 2.

## REPLEVIN.

1. If a sheriff take a replevin bond from one surety only, and he be sued thereon by the person making cognizance for having taken insufficient pledges, who recovers damages and costs in such action:—*Held*, that the sheriff having sued the surety on the bond for not having returned the goods, and suggested breaches according to the statute of 8 and 9 Wm. 3. c. 11., is not entitled to recover the costs incurred in defending the action against him as such sheriff; and that as the surety is deprived of calling on his co-surety for contribution, he is only liable to a moiety of the damages awarded by

## REVERSION.

the jury in the action against the sheriff *Austen, Esquire, sheriff of Surrey, v. Howard, H. 57 G. 3.*

Page 68

2. In a declaration in replevin for taking goods, the description, number, and value of them must be stated with certainty. *Pope v. Tillman, and another, T. 57 G. 3.*

386

## RESERVATION.

See DEED, 1.

REVERSION.

## REVERSAL OF OUTLAWRY.

See ARBITRATION, 2.

## REVERSION.

1. An estate, granted by the crown to a subject as tenant in tail for services, is not barred, so as to destroy the reversion of the crown; although two private acts of parliament may have been passed, confirming a settlement by the tenant in tail, purporting to pass such reversion, the crown being a party to neither of such acts, and each of them containing a saving clause, by which its rights were expressly reserved. *Milford v. Elliott, M. 58 G. 3.* 434
2. If a private act of parliament confirm a settlement of such estates made by the tenant in tail, and a subsequent act vest part of these estates in trustees for sale, with directions to purchase other lands with the produce of such sale, to be settled in lieu thereof, to the same uses as expressed in the preceding act:—*Held*, that the trustees had no power to convey the estates, so granted by the crown to a purchaser and his heirs in fee simple, and that the substitution of other lands did not destroy the reversionary interest of the crown in

VOL. I.

## SERVICES.

609

the estates originally granted. *Milford v. Elliott, M. 58 G. 3.* Page 434

## REVOCATION OF AUTHORITY.

See ARBITRATION, 3.

## RULE FOR COSTS.

See PRACTICE, 7.

## RULE TO PLEAD.

See PRACTICE, 9, 10.

## SALE.

See BANKRUPT, 1.

EVIDENCE, 1.

FRAUDS, STATUTE OF, 1.

INTEREST, 1, 2.

PLEADING, 18.

REVERSION, 1.

STOPPAGE IN TRANSITU, 1.

VARIANCE, 4.

WARRANTY, 1.

## SALE AND RETURN.

See BANKRUPT, 6.

## SALVAGE.

See INSURANCE, 6.

## SAVING CLAUSE.

See REVERSION, 1.

## SEAMENS' WAGES.

See SHIP, 1.

## SCHEDULE.

See PRISONER, 2.

## SEIZURE OF GAME.

See GAME, 2.

## SERVICES.

See REVERSION, 1.

R R

## SERVICE OF PROCESS.

See PRACTICE, 18.

## SET-OFF.

1. Where a broker effected a policy of insurance in the name of his principal, under a *del credere* commission, and guaranteed the solvency of the underwriters in the body of the policy, which was left in the custody of the assured until the broker had paid the loss, according to the terms of the guarantee:—*Held*, that a loss having happened before the bankruptcy of one of the underwriters, and adjusted afterwards, could not be set-off by the broker, in an action brought against him by the assignees to recover premiums due to the bankrupt, either as constituting a mutual debt or mutual credit, although the broker had accounted for such loss with the assured before the bankruptcy. *Peele, and others, assignees of Wadington, a bankrupt, v. Northcote, and another, E. 57 G. 3. Page 178*

## SETTING ASIDE AND STAYING PROCEEDINGS.

See PRACTICE, 3. 9. 11. 15.

## SETTLEMENT.

See BOND, 2.

REVERSION, 1.

## SHERIFF.

See EXECUTION, 2.

1. Where a sheriff, by virtue of a *feri facias*, took in execution goods of a person, who after the seizing,

and before the sale of them, became bankrupt, and the assignees gave the sheriff due notice of the bankruptcy, and at the same time required him not to sell:—*Held*, that the sheriff, having applied to the plaintiff in the action for an indemnity for proceeding to sale, as well as to the assignees for returning *nulla bona*, was, on refusal of such indemnity by both parties, justified in selling the goods, and the court interfered to protect him. *King, and another, assignees of Maine, a bankrupt, v. Bridges, and another, sheriff of Middlesex, H. 57 G. 3. Page 43*

2. If a sheriff take a replevin bond from one surety only, and he be sued thereon by the person making cognizance for having taken insufficient pledges, who recovers damages and costs in such action:—*Held*, that the sheriff having sued the surety on the bond for not having returned the goods, and suggested breaches, according to the statute of 8 and 9 Wm. 3. c. 11. is not entitled to recover the costs incurred in defending the action against him as such sheriff, and that as the surety is deprived of calling on his co-surety for contribution, he is only liable to a moiety of the damages awarded by the jury in the action against the sheriff. *Austen, Esquire, sheriff of Surrey, v. Howard, H. 57 G. 3. 68*

## SHERIFFS' OFFICER.

See PRACTICE, 12.

## SHIP.

See CHARTER-PARTY.

FREIGHT.

INSURANCE.

PILOT, 1.

## STATUTES.

1. In an action of *assumpsit*, brought by the master of a vessel, against his owners, to recover wages which accrued during his detention in a foreign port; it is not incumbent on him to prove that freight was earned.—It is sufficient for him to shew that he has performed his services, and the defendants must adduce evidence to prove that he is not entitled to remuneration. *Brown v. Muller, and another, H. 57 G. 3.* Page 65

### SHIP-OWNER.

See AGENT, 2.

### STATUTES—CONSTRUCTION OF.

See APOTHECARY, 1.

1. A prisoner, in execution, on an attachment for non-payment of costs pursuant to an award, may be brought up at the instance of the prosecutor to deliver in a schedule of his effects under the compulsory clause in the statute of the 32 Geo. 2. c. 28., as that statute may be incorporated with the 33 Geo. 3. c. 5. *Rex v. Curwen, a prisoner, M. 58 G. 3.* 494

### STATUTES—CITED OR COMMENTED ON.

Edward 1.

6. c. 5. Waste. 100

Elizabeth.

13. c. 5. s. 6. Fraudulent Conveyance. 191

James 1.

21. c. 19. s. 11. Bankrupt. 36—521

## STATUTES.

611

Charles 2.

12. c. 18. s. 8. Navigation Act. Page 531  
16. & 17. c. 8. s. 3. Bail in error. 118  
17. c. 8. s. 1. Death of Party—Judgment. 288  
22. & 23. c. 9. Costs. Certificate. 422  
22. & 23. c. 25. s. 1. Game. 294  
29. c. 3. s. 17. Frauds—Statute of. 40, 329

William 3.

8. & 9. c. 11. s. 8. Suggestion of Breaches. 68

Anne.

3. & 4. c. 9. s. 7. Bills of Exchange. 63  
4. c. 16. s. 1. Pleading—Jeofails. 387  
5. c. 14. s. 4. Games. 293  
6. c. 16. s. 4. Brokers. London. 9

George 1.

- vi. c. xxix. Shrewsbury Estate 435

George 2.

5. c. 30. s. 28. Bankrupt—Mutual Credit. 452  
11. c. 19. s. 23. Replevin Bond—Sureties. 72  
32. c. 28. s. 16, 17. Execution—Prisoners. 494

George 3.

- xv. c. xxiii. Clerkenwell. 162  
xvii. c. lxiii. Clerkenwell. 162  
33. c. 5. s. 4. Execution—Prisoners. 495  
34. c. 9. French Property. 136  
35. c. 63. s. 13. Policy of Insurance. 116

43. c. 18. s. 21. Bank Act.	Page 27
— c. 46. s. 3. Arrest—Costs—	
Execution.	93. 132
49. c. 121. s. 17. Bankrupt—An-	
nuitiy Creditor.	199
— s. 19. Bankrupt—Dis-	
charge from Covenants in Leases.	197
51. c. 124. s. 1. Arrest—Costs—	
Process.	131
52. c. 39. s. 30. Pilots.	5
55. c. 194. s. 14. Apothecaries.	
after published.	103

### STOPEPAGE IN TRANSITU.

The warrants of the *West India Dock Company* are equally negotiable as bills of lading, and, when endorsed for a *bona fide* consideration, are deemed equivalent to a delivery of the goods in the company's warehouses. — Therefore, where a broker had obtained warrants from B, by a fraudulent payment, and had sent them into the market, where they were purchased by the brokers of A., who paid for the goods, on the receipt of the warrants: — *Held*, that A. might maintain an action of trover against B., as the transfer of the warrants by his broker was a constructive delivery of the goods, so as to defeat B.'s right of stopping them *in transitu*. *Zwinger and another, v. Samuels, H. 57 G. 3. 12*

A trader, in London, was in the habit of purchasing goods at Manchester, and exporting them to the Continent shortly after their arrival in London. The goods consigned to him remained in the waggon-office of the defendants, who were carriers, until they were removed by his agent, for the purpose of being shipped: — *Held*, that such trader, having become bankrupt, the assignees

### TENANT IN TAIL.

were entitled to recover goods deposited with the defendants before the bankruptcy, and that the consignee had no right to stop them *in transitu*, as the trader had no warehouse of his own: — *Held*, also, that the *transitus* of the goods was at an end on their arrival at the waggon-office. *Rave, and another, assignees of Lange, a bankrupt, v. Rickford and another, M. 58 G. 3. Page 526*

### STRANDING.

See PAYMENT OF MONEY INTO COURT, 1.

### SUBPOENA.

See WITNESS, 1.

### SUPERSEDEAS.

See REGULA GENERALIS. VARIANCE, 2.

1. An order for a *supersedeas* to discharge a defendant out of custody, on perfecting bail, must be filed with the prothonotary on his signing the writ of *supersedeas*. *Lock v. Craddock, E. 57 G. 3. 144*

### SUPPLEMENTAL AFFIDAVIT.

See AFFIDAVIT TO HOLD TO BAIL, 2.

### SURETY.

See BANKRUPT, 2.  
BILLS OF EXCHANGE, 4.  
BOND, 1.  
REPLEVIN, 1.

### SURRENDER OF LEASE.

See INFANT, 2.

### TENANT IN TAIL.

See REVERSION.



## TRIAL.

### TENDER.

See AFFIDAVIT TO HOLD TO BAIL, 1.  
PLEADING, 2.

1. An action of debt was commenced against the defendant for the non-payment of rent, and discontinued:—An action of covenant was then brought for the same rent, which the defendant tendered previously to its commencement:—*Held*, that such tender was well pleaded. *Johnston v. Clay*, E. 57 G. 3.

Page 200

### TESTATUM CAPIAS.

See AMENDMENT, 1.

### TIME TO PLEAD.

See PRACTICE, 10.

### TITLE.

See INTEREST, 1, 2.  
LEASE, 1.

### TRADE—USAGE OF.

See CHARTER-PARTY 1.

### TRESPASS.

See ACTION ON THE CASE, 1.

1. In a declaration of trespass for breaking and entering a house, the premises were laid in the parish of Clerkenwell: It was proved that Clerkenwell consisted of two parishes, or districts, though it was generally known by the name of Saint James, Clerkenwell:—*Held*, an insufficient description. *Taylor v. Hooman*, E. 57 G. 3.

161

## TRIAL.

See AFFIDAVIT.  
PRACTICE, 7.  
WITNESS, 1.

## USES.

613

### TRIAL—NOTICE OF.

See PRACTICE, 5.

### TROVER.

See BANKRUPT, 5, 6.

LIEN, 1.

STOPPAGE IN TRANSITU, 1.

1. An action of trover cannot be maintained by the assignee of a bankrupt, to recover bills of exchange from the holder, who drew them with a knowledge of the bankrupt's insolvency, and after compelling such bankrupt to sign, induced debtors of the bankrupt, who were not aware of his circumstances, to accept them. *Walker, and another, assignees of Dunn, a bankrupt, v. Loring*, T. 57 G. 3.
2. Bills of exchange indorsed by an agent of the plaintiff, or order for their account, deposited with the defendant by such agent as a security for future advances, may be recovered by the plaintiff in an action of trover. *Trickett and another, v. Barnden, and another*, M. 48 G. 3.

### TRUSTEES.

See REVERSION, 1.

### UNDERWRITER.

See INSURANCE.

PAYMENT OF MONEY INTO COURT, 1.

SET-OFF, 1.

### USAGE OF TRADE.

See CHARTER-PARTY, 1.

## USES.

See REVERSION, 1.

## VARIANCE.

1. An indenture of lease, containing a covenant by the lessee, to repair the premises at all times, (as often as need or occasion should require), "*and at farthest within three months after notice,*" is one entire covenant, the former part of which is qualified by the latter: The plaintiff having treated this in his declaration as an absolute covenant to repair, and omitted the latter part of the clause, containing the notice:—*Held*, that the variance was fatal. *Horsfall v. Testar*, *H. 57 G. 3.*

Page 89

2. A commission of bankruptcy recited that *A.* and *B.* became bankrupt, with intent to defraud *C.* and *D.* surviving partners of *Edmond Darby*, but the writ of *supersedeas* stated them to be surviving partners of *Edward Darby*:—*Held*, in an action for maliciously suing out the commission, that the variance was fatal. *Matthews v. Dickinson*, and another, *E. 57 G. 3.*

104

3. In a declaration of trespass for breaking and entering a house, the premises were laid in the parish of *Clerkenwell*: It was proved that *Clerkenwell* consisted of two parishes or districts, though it was generally known by the name of *Saint James, Clerkenwell*:—*Held*, an insufficient description. *Taylor v. Hooman*, *E. 57 G. 3.*

161

4. The plaintiffs declared that they agreed to sell, and the defendant to buy certain goods and merchandize; *to wit*, three hundred and twenty-eight chests and thirty half chests of oranges and lemons, at and for a certain price, *to wit*, the price of 623*l.* 3*s.*—The contract proved was, for three hun-

## VENUE.

dred and eight chests and thirty half chests of *China* oranges, and twenty chests of lemons, without specifying price.—*Held*, that this was no variance. *Crispin*, and another, *v. Williamson*, *M. 58 G. 3.*  
Page 547

## VENDOR AND PURCHASER.

See BANKRUPT, 6.

EVIDENCE, 1.

FRAUDS, STATUTE OF, 1.

INTEREST, 1.

PLEADING, 18.

1. Where the purchaser of an estate, by public auction, deposits a sum with the auctioneer, as part of the purchase money, until the vendor make out a good title, according to the conditions of sale:—*Held*, in an action to recover such deposit from the auctioneer, that he is not liable for interest, although nearly four years may have elapsed from the time of the sale;—on the ground that no demand had been made on him for the re-payment of the deposit. *Lee and another v. Alunn*, *M. 58 G. 3.*

481

## VENUE.

See AMENDMENT, 1.

1. The court will not allow the venue to be changed in an action on a charter-party of affreightment on the usual affidavit. *Morris v. Hurry*, *H. 57 G. 3.*
2. The venue in a declaration being laid in a county palatine, the court would not allow it to be changed, after error assigned for want of an original writ. *Millington v. Goodmin*, *E. 57 G. 3.*

166

## WARRANTY.

### VERDICT.

See AFFIDAVIT.  
ARBITRATION, 3.

## WAGES OF SEAMEN.

See SHIP, 1.

## WARRANT OF ATTORNEY.

See RECOVERY, 2.

1. If a joint warrant of attorney be entered into by two persons, with an unconditional defeasance; and the plaintiff, by letter, stipulating that the money should be payable by instalments, pledged himself not to proceed against the parties, unless he apprehended failure:—*Held*, that if he was apprehensive of the failure of one, he might enter up judgment against the other, before the first instalment became payable. *Partridge v. Herbert and Fraser*, H. 57 G. 3. Page 54
2. A judgment on a warrant of attorney may be entered up at the suit of, but not against, a survivor. *Raw v. Alderson*, E. 57 G. 3. 145

## WARRANTY.

1. The plaintiff bought saffron of an inferior quality, which, having kept six months, and sold part; he then objected that the article was not saffron:—*Held*, in an action for a breach of warranty, that from the length of time, and inferior price given, it was such an article as the plaintiff intended to purchase. *Prosser and another v. Hooper*, E. 57 G. 3. 106
2. The plaintiff in declaring on a warranty of seed, averred, that the defendant undertook that it was good, and which he *could* warrant:—*Held*, a sufficient aver-

## WITNESS.

615

ment to express an absolute and special warranty. *Button v. Cor-der*, E. 57 G. 3. Page 109

## WASTE.

1. An action on the case for permissive waste is not maintainable against a tenant for years, if he hold premises under an express contract or covenant to repair. *Jones v. Hill*, E. 57 G. 3. 100

## WEST INDIA DOCK WARRANT.

See BANKRUPT, 1.

1. The warrants of the *West India Dock Company* are equally negotiable as bills of lading, and, when indorsed for a *bona fide* consideration, are deemed equivalent to a delivery of the goods in the company's warehouses.—Therefore, where a broker had obtained warrants from B. by a fraudulent payment, and had sent them into the market, where they were purchased by the brokers of A., who paid for the goods, on the receipt of the warrants:—*Held*, that A. might maintain an action of trover against B., as the transfer of the warrants by his broker was a constructive delivery of the goods, so as to defeat B.'s right of stopping them *in transitu*. *Zwinger and another, v. Samuda*, H. 57 G. 3. 12

## WITNESS.

See LABEL, 1.

1. If the plaintiff subpoena witnesses, and remunerate them accordingly, who have been previously subpoenaed by, and received their expenses from the defendant,

which circumstances they concealed from the plaintiff; the court will allow the latter the expenses he has paid those witnesses for their attendance, although they were not called for him at the trial, on the ground that such payment was obtained by fraud.

*Benson v. Schneider, H. 57 G. 3.*

*Page 76*

2. In an action against several defendants, as partners, for goods sold; some of whom pleaded bankruptcy, and others the general issue:—*Held*, that after the

plaintiff had closed his case, and the bankrupt defendants had proved the bankruptcy, one of the bankrupts could not be admitted as a witness, to shew a dissolution of the partnership, prior to the delivery of the goods. *Emmett and another, v. Bradley and others, T. 57 G. 3.*

*Page 332*

### WRIT.

*See* AMENDMENT, 1.  
PRACTICE, 18.  
VENUE, 2.

END OF THE FIRST VOLUME.



